THE SUPREME COURT: THE LEAST DANGEROUS BRANCH

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Abstract

There has been much debate about the United States Supreme Court and the importance of selecting the "right" justice to sit on the bench. These debates have resulted in several hostile confirmation battles between both parties in the United States. These battles attributed to the perception that the Supreme Court is a powerful organization with the power to determine what rights the United States citizens may or may not possess.

This thesis attempts to prove that the Court does not have as much power as the public may think. Specifically, it looks at three separate factors that would demonstrate an influential Supreme Court. These three factors included the constitutional right to judicial review, the concept of judicial supremacy, and the Court's legitimacy. This thesis will show that the Court does have judicial review, but does not possess complete supremacy, and struggles to maintain legitimacy.

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Dedication

This thesis is dedicated to my loving wife, Mariah Hartman, and my wonderful children, Reagan, Wyatt, Hudson, and Owen Hartman, for their outstanding support and love.

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Introduction

On September 17, 1787, the framers signed the United States Constitution. It was ratified into law on June 21, 1788, officially creating the United States government. This document has been at the center of many debates since. The Supreme Court is viewed as the entity that rules on these decisions. The nine Supreme Court Justices are often viewed as the guardians of our liberties. In Federalist No. 78, Alexander Hamilton discussed the role of the Court. He stated that they are to be an independent judiciary who, at times, may need to declare acts that are contrary to the constitution void.[1] When the Constitution was written, many in society were concerned with the prospect of a tyrannical government. They were primarily concerned with one branch having too much power. During their time under British rule, the judges served at the will of the King. For that reason, many were also skeptical about placing certain powers into the hands of the judiciary. To address these concerns, Alexander Hamilton reminded people that the judiciary would be the "least dangerous branch" (least powerful), as they possessed neither the power of the sword nor the power of the purse. Today nearly 233 years after the Constitution was written, many believe that the Court has become too powerful. This belief may be partly because of the misunderstanding of what the Court does and the power they have.

This misunderstanding is fueled by politicians and scholars alike. In one article, the scholar argued that the Court was the last hope for the left. In her article, she argues that the Court must move away from judicial restraint and stop conservative policies.[2] She believes that the Court can use their judicial review power to stop specific actions when the liberal population

[1] Alexander Hamilton, "Federalist No. 78" May 28, 1788

[2] Caroline Fredrickson, "The Least Dangerous Branch-And the Last Hope of the Left." *Harvard Law & Policy Review,* July 2, 2020, 12 (1): 121–44. http://search.ebscohost.com.proxy1.library.jhu.edu/login.aspx?direct=true&AuthType=ip,shib&db=asn&AN=133710874&site=ehost-live&scope=site.

may not agree. This idea is known as judicial activism, something that is not limited to the liberal side. The idea that the Court should weigh in on the most sensitive issues has become commonplace. That is the reason that many presidential candidates raise that as one of their key issues. In the 2016 election, there was a vacant seat left by the deceased Antonin Scalia. His seat had the potential to tip the scales toward a more liberal makeup of the Court. Then presidential nominee Donald Trump campaigned that he intended to put more justices like Antonin Scalia on the bench. Many in America feel that it is the job of the Court to solve the most divisive issues. In a poll taken in January 2005, the registered voters were asked if a Senator would be justified or unjustified if they voted against a fully qualified nominee if they disagreed on their stance on salient issues like abortion, gun control, or affirmative action.[3] When that poll was taken, 51% believed it would be justified to vote against the nominee, while only 46% thought it unjustified.[4] Another poll from the pew research center taken in July of 2018 asked how important the choice for the next Supreme Court justices was to them personally. The responses were that 63% felt it was very important, and another 20% found it somewhat important.[5] These numbers demonstrate that the general public may view the Court as an organization with immense power to determine the future of our liberties. This idea is even at times, supported by the president. One such example comes from a recent social media post from President Donald Trump. He stated, "These horrible and politically charged decisions coming out of the Supreme Court are shotgun blasts into the face of people that are proud to call themselves Republicans or Conservatives. We need more justices, or we will lose our 2nd Amendment and everything else."[6] The above examples raise the question, if ordinary citizens and the president believe that the Court has this immense

[3] "Supreme Court Poll" Gallup, https://news.gallup.com/poll/4732/supreme-court.aspx
[4] Ibid.
[5] "Judiciary Polling Report" Pew Research Center, https://www.pollingreport.com/court.htm
[6] Ibid.

power, was Alexander Hamilton wrong? Is the Supreme Court still the "least dangerous branch?" This question needs an answer because the Courts are viewed as guardians of liberty, and if they are becoming too powerful, freedoms could be in jeopardy. Several factors must be assessed to determine just how powerful the Court is. The first question that needs an answer is if judicial review is Constitutional. The pinnacle of the Court's power is that they can overturn laws that are not in line with the Constitution. However, if the power was not authorized, they may not be as powerful as some may think. To prove judicial review is constitutional, historical documents such as the Constitution itself will be analyzed.

Furthermore, the Federalist and Anti-Federalist papers will be analyzed to see what the founders and those who opposed the Constitution thought about the judiciary's power. This analysis will result in the determination of the constitutionality of the primary power of the judiciary. The next question that needs to be addressed about the judiciary's power is if their rulings are final. That is, do they possess judicial supremacy, or can other areas of the government override them? This question is an integral part of the judiciary if they have become increasingly powerful, then it is likely that their decisions are final. If they do not possess the final say on all matters, they may not have as much power as society believes. This question is analyzed through the application of different Supreme Court cases and how individual presidents have responded to Court orders in the past. The final factor in determining the power of the Court is how they maintain legitimacy. Most scholars believe that the Court relies heavily on the public to keep the power that they have. Much like the first two aspects of the Court, if this part of the Court is non-existent or even threatened, then they may not be as powerful as some may think. If they have lost legitimacy in the public's eyes, it is less likely that people will be inclined

to follow their rulings. To determine the legitimacy of the Court, the Court itself will be analyzed.

Specifically, a breakdown of the polarization of the Court is explored in this Thesis. This will include a study into the Court going back to 1970 to determine if a polarization pattern can be recognized. Additionally, the nominations process is analyzed to see if the nominations process's polarization has impacted the way the Court is made up. Finally, the role of the most recent Chief Justice and the Court's relationship with Congress and the president is explored. By answering these questions, this paper will prove that the Court is still the least dangerous branch. Despite the increased perception of a mighty Court, they still fight to maintain legitimacy, unlike the other branches. The remaining chapters will prove this point that the Court cannot act without the support of the sword and purse. The remainder of this paper will explore these concepts in depth and look at how the scholars view these different issues. One thing that makes this paper stand out is that it incorporates all these themes into one central paper. Most of the scholarly work that was found in the process of researching this topic only covers one or two areas. However, this paper tends to fit into the scholarly works that supports the idea that the Court possess the constitutional right to judicial review, does not have exclusive judicial supremacy, and is still the weakest branch.

Chapter 1: Judicial Review

On March 4, 1789, the United States officially began governance under the United States Constitution. This document provides the three branches of government with their powers and describes the branches' responsibilities. This chapter will focus on the judicial branch and the powers vested to it by the Constitution. These powers are in Article III of the United States Constitution. The specific power that will be looked at is the power of judicial review. Judicial review is a power that has allegedly been vested to the courts by the Constitution, which grants the Court with the ability to strike down law that is contrary to the Constitution. Looking at the power of judicial review, this chapter seeks to answer this question: Is judicial review constitutional? Even though the Constitution was written over 200 years ago, there is still debate amongst legal minds and scholars about the constitutionality of judicial review. Many scholars give credit to the Great Chief Justice John Marshall for the creation of judicial review in the courts. This was supposedly accomplished when Chief Justice Marshall wrote the majority opinion for *Marbury v. Madison.* Because Chief Justice Marshall is credited with the creation of judicial review, many scholars have argued that it is not constitutional, as it is never explicitly mentioned in the Constitution. This leads to the idea that if it is not expressly mentioned in the Constitution, and a member sitting on the Supreme Court created it, it cannot be constitutional. Scholars such as John Eastman and Jeremy Waldron have argued that judicial review is unnecessary and democratically illegitimate and unconstitutional.[7] This chapter seeks to prove that judicial review is constitutional and was established before the landmark decision of

[7] John Eastman, "Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?" *Harvard Journal of Law & Public Policy 28,* no. 3 (2005): 713-740 and Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. (2006): 1348-1406.

Marbury v. Madison. This chapter will do this by covering pre-constitution case law; Articles VI and Article III; and finally, speeches and essays written by the framers during the ratification.

Literature Review

The origins of judicial review have been heavily contested amongst scholars. This chapter will address this issue. Before the schools of thought are discussed, a brief history of judicial review will be provided. The United States developed a government that was to be for the people by the people. This was to be achieved through the U.S. Constitution as it outlined certain powers of each branch of the government. These branches consisted of the Legislative branch, the Executive branch, and the Judicial branch. Each branch was meant to provide certain checks to ensure that no one branch would go against the people's will. One of the powers that the Judicial branch has is the power of judicial review. Judicial review is the power for the Court to render an act of legislation or an executive order unconstitutional. The problem with judicial review is that there are still questions about the constitutionality of this power. This begs the question, if judicial review is still being debated where exactly did the power come from? To get a better understanding, one would first need to look at the Constitution itself. The powers of the Court are in Article III of the Constitution, specifically, in section 2 the Constitution discusses that the judicial power "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[8] The reason that debate continues on judicial review is that the Constitution never explicitly states that the judiciary shall have judicial review power. Since judicial review is not in the Constitution, how did this power come about? And why are there debates about the

[8] U.S. Const. Art. III, § 2

constitutionality of this power? The answers can be found by looking at the different schools of thought surrounding this power. This review is intended to explore these schools of thought, break down the debates, and determine where the gaps need to be filled. After reviewing several sources, the following schools of thought have been identified. The first school of thought is that judicial review, while not explicitly mentioned, was implicitly there and thus is constitutional and necessary for the preservation of the republic. The second school of thought is that judicial review is not technically constitutional but is accepted practice and essential for the republic's protection. The final idea is that judicial review is not constitutional and is not in line with the government's democratic principles. In the academic world all three of these schools of thought have some degree of following. However, given that judicial review has become a widely accepted practice, it can be argued that the first school of thought carries the most weight. This chapter will seek to prove this point.

Judicial review has played a significant role in our government's operation and, as many argue, the preservation of our rights. It is mostly agreed upon by scholars that the case that led to judicial review of national legislation was *Marbury v. Madison*. In the article "The Case that Made the Court," he gives *Marbury v. Madison* credit for the creation of judicial review.[9] As stated above, one of the schools of thought surrounding judicial review is that even though it is not explicitly mentioned in the Constitution, it is implied and thus is constitutional. The article The "Fundamental and Natural Law 'Repugnant Review' Origins of Judicial Review" goes into detail about the pre-Marbury decisions and the use of judicial review in early English sixteen and seventeenth century.[10] The article argues that even though the Marbury case solidified the use of

[9] Michael Glennon, "The Case That Made the Court," *Wilson Quarterly 27,* no. 3 (2003): 20.
[10] Lawrence Perrone, "The Fundamental and Natural Law 'Repugnant Review' Origins of Judicial Review," *BYU Journal of Public Law 23* no. 1 (2008): 61-81

judicial review in our government, the early colonists' actions are what makes the use of judicial review an implied constitutional power.[11] This argument is furthered in Philip Hamburgers book *Law and Judicial Duty.* In his book he argues that when judicial review came about in America, it was not a significant government innovation. Rather, he argues that when the early colonist began declaring colonial and state legislative acts unconstitutional, and it continue in the federal government, they were simply acting on centuries-old common law practices.[12] In other words, these authors argue that because judicial review is rooted in the earliest stages of the United States, it was evident that the founders had intended for that power to exist. Another article that argues that judicial review was a practice that was accepted before the landmark case of *Marbury v. Madison* is the article titled "Before Marbury: *Hylton v. United States* and the Origins of review." In this article, Robert Frankel argues that judicial review was not first applied in the Marbury case, but rather in *Hylton v. United States*. He states that the Supreme Court first suggested using judicial review when they decided on the government's constitutionality to impose a Carriage tax. Essentially, they agreed that it was the legislature's right to impose the indirect tax as it fell into their powers written in the Constitution.[13] By doing this, they utilized the power of judicial review. The author also believes that the powers are implicit in the Constitution and refers to Federalist 78. In Federalist 78, Alexander Hamilton states that it is the duty of the Court to "declare all acts contrary to the manifest tenor of the Constitution void."[14] This is where many of the scholars who feel that it is implied get their belief. Another area where that creates an understanding for implied judicial review is found in the Anti-Federalist paper

[11] Ibid.
[12] Philip Hamburger, *Law and Judicial Duty.* Cambridge (Massachusetts): Harvard university Press, 2008.
[13] Robert Frankel Jr., "Before Marbury: Hylton v. United States and the Origins of Judicial Review," *Journal of Supreme Court History 28,* no 1. (2003): 1-13.
[14] Federalist 78

written by Brutus. These papers are titled Brutus 1 and 11; in Brutus 1, the Anti-Federalist simply quotes the judicial power as written in the Constitution. In Brutus 11, the author states that "if these powers were to be so vested in the Supreme court, they would be held unaccountable to the will of the people and any errors they may commit in their act of judicial review would not be corrected by any other power.[15]

Another argument that is made about the origins of judicial review is that it was used in early society prior to the Constitution but only in the direst situations. This is argued in Sylvia Snowiss' book *Judicial Review and the Law of the Constitution.* In her book, she argues that prior to the *Marbury v. Madison* case in 1803 judicial review was practiced.[16] However, she argues that it was not used on a regular basis and was only applied when there was a clear violation of fundamental law. She further argues that when Chief Justice Marshall made his ruling, he altered the way that judicial review was intended to operate and expanded the scope of the judicial power. This argument takes the side that judicial review was intended but not in the scope that it operates today.

The origin of judicial review still seems to be a topic of debate. The article "The Origins of Judicial Review" discusses the textual evidence that suggests judicial review was the original intent of the Constitution. The author establishes this using Article III, Section 2 of the Constitution. The author argues that the verbiage permitting the judiciary with the power of all cases arising under the Constitution permits judicial review.[17] The author then argues that the

[15]" Brutus 1 and 11

[16] Sylvia Snowiss, *Judicial Review and the Law of the Constitution.* (New Haven, Connecticut): Yale University Press, 1990.

[17] Saikrishna B. Prakash, and John C. Yoo. "The Origins of Judicial Review." *The University of Chicago Law Review* 70, no. 3 (2003): 887-982. doi:10.2307/1600662.

Supremacy Clause in the Constitution makes the document supreme to all other statutes and, as such, requires the Court to declare acts contrary to the Constitution void.[18]

Another article worth noting is an article titled "Unleashing the Least Dangerous Branch." In this article, the author discusses a debate that is going on amongst conservatives and libertarians. On both sides of the discussion, it is accepted that judicial review is necessary for preserving the republic; at this point, it is just a debate about how much review is needed. The author discusses that judicial review has played an essential role in determining certain rights. The author discussed cases such as *Brown v. Board of Education*, *Roe. v. Wade* and other matters involving civil rights.[19] The author accepts that at least to a certain degree had it not been for the Court, we may still be in an era of segregation. However, the author then discusses that there are libertarian scholars that believe that the Court must also decide on natural rights that are not written. In other words, they think that the Court should take on the role of judicial engagement.[20] One of the most vocal scholars of this mentality is Randy Barnett. In his article "In Defense of Constitutional Republicanism," he discusses the lack of court interference that results in the government's over-reach.[21] However, the author of the "Least Dangerous branch" disagrees and believes that the Court should continue to exercise judicial restraint and argues that in recent years, the Court has utilized too much judicial review power giving more power to the federal government. The argument this author makes is the judicial review is necessary but should only be used in moderation.

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[18] Ibid.
[19] Mark Pulliam, "Unleashing the 'Least Dangerous' Branch," *Texas Review of Law & Politics 22,* no. 3 (2018): 423-468
[20] Ibid.
[21] Randy Barnett, "In Defense of Constitutional Republicanism," *Constitutional Commentary 32* no. 1, (2017): 207-246.

Another argument that is out there is the idea of utilizing the Court's judicial review power to restrain the power of one political party over the other. In the article "The Least Dangerous Branch-And the Last Hope of the Left," the author argues that judicial review is not only constitutional, but it should also be used by the Democratic party to stop the policy actions of the Republican party and President Trump.[22] The author argues that for our rights to be preserved, the courts must intervene in the party's actions to stop unconstitutional actions. The author then states that the courts are already beginning to do this and describes the use of the Court to halt executive actions including the travel ban.[23] This is similar to the theory of judicial engagement suggested by libertarians in the article "In Defense of Constitutional Republicanism." Some scholars believe in judicial restraint while other scholars believe in judicial engagement, with the difference of understanding, it raises the question: What is the intent of judicial review? This gives rise to another school of thought regarding judicial review. If judicial review was given to the courts to determine the constitutionality of laws, but each branch is supposed to be separate but equal, would this then give the president and Congress the right to determine constitutionality as well[24] This argument is presented in the article "Judicial Review and Non-Enforcement at the Founding." This is important because if the Court ruled against the travel ban, is it possible for President Trump to determine that he is, in fact, within his constitutional rights to pursue the ban and ignore the Supreme Court decision? According to the author of "Judicial Review and Non-Enforcement at the Founding," it is plausible. This was also an argument that Thomas Jefferson presented in his letter to Judge Spence Roane. In this

[22] Caroline Fredrickson, "The Least Dangerous Branch-And the Last Hope of the Left," *Harvard Law & Policy Review 12,* no. 1 (2018) 121-144
[23] Ibid.
[24] Matthew Stellen, "Judicial Review and Non-Enforcement at the Founding," *University of Pennsylvania Journal of Constitutional Law 17* no. 2 (2014): 479-568.s

letter, he advocated for each branch to have the power of Constitutional interpretation. Declaring that the Constitution bounds each branch and thus, it is their duty to uphold the Constitution.[25]

So far, the schools of thought that have been covered include the idea that judicial review is constitutional because it is implied by the founders and necessary to protect the people's rights. The next school of thought covered is that it is needed but must be used in moderation. The final school of thought covered above is that it is necessary and should be used more.

The next school of thought that will be covered is that judicial review in its current form should not exist, and it is contrary to the original intent of the founders. This line of reasoning can be found in the articles titled "The Writ-Of-Erasure Fallacy" and "Whatever the Judges Say it Is? The founders and Judicial Review " In these articles, the authors discussed how the power of judicial review had become widely accepted as the power for the Court to nullify a law if it is unconstitutional.[26] The authors assert that this is not the real purpose of the Court, and if judicial review is intended, it is only to state an opinion and allow the legislature to make the law fit in the confines of the Constitution.[27] The authors state that the real power lies in the people's hands, and giving the Court such control makes them unequal to the other branches and thus the most powerful.[28] Another article that discusses judicial power growth beyond the original intent is an article written by Gordon Wood. In this article, he explains how the Court was once referred to as the least dangerous branch, but over time has seized additional power using judicial review. The author asserts that following the case of *Marbury v. Madison*, the Court has managed to

[25] Thomas Jefferson, "Letter to Judge Spencer Roane" (1819).
[26] Joyce Malcom, "Whatever the Judges Say it is? The founders and Judicial Review" *Journal of Law & Politics 26,* no. 1 (2010): 1-37. And Jonathan Mitchell, "The Writ-Of-Erasure Fallacy" *Virginia Law Review 104,* no. 5 (2018): 933-1019.
[27] Ibid.
[28] Ibid.

expand its influence and alter the course of American government.[29] It would seem that this school of thought is that judicial review in a basic form is ok, but it has grown beyond its original intent. Another article that follows Professor Woods's line of thinking is the article "The Origins of Judicial Review: A Historian's Explanation." In this article, the author discusses how the Constitution itself does not grant judicial review power. Instead, it was a by-product of events in the eighteenth century that led to judicial review.[30]

The above school of thought discusses how judicial review in its current form is too vast; however, the next school of thought discusses how judicial review is unnecessary. In the article written by John Eastman, he argues that the power of judicial review, even as written by John Marshall, was not originally intended to give the Court the final say on the constitutionality of laws, but rather to provide them with a say. The author argues that judicial review is not needed to maintain our republic and is meant to allow for collaboration amongst the branches of the government.[31] This thought process is like the one mentioned above, which states that it is up to each branch to interpret the Constitution. The difference is that the author argues that judicial review is not necessary, while the other author argues that it is in moderation. Another article that claims that judicial review is not required to protect rights is written by Jeremy Waldron. Here he states judicial review is unnecessary for the protection of rights; it is also democratically illegitimate. In his argument, he says that because the governed's consent ultimately gives power, the people can determine which rights they have without needing the Court's interference.[32] He

[29] Gordon S. Wood, "The Origins of Judicial Review Revisited, or How the Marshal Court Made More out of Less," *Washington and Lee Law Review 56*, no. 3 (1999): 787-810.
[30] Charles F. Hobson, "The Origins of Judicial Review: A Historian's Explanation," *Washington and Lee Law Review* 56, no. 3 (1999): https://scholarlycommons.law.wlu.edu/wlulr/vol56/iss3/4
[31] John Eastman, "Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?"
[32] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. (2006): 1348-1406.

goes on further to state that to preserve democratic principles, the people need to make these decisions and not rely on a court of unelected individuals to decide on behalf of the people. Through court interference, the author argues that it goes against any democratic form of government.[33]

As noted throughout this literature review, several schools of thought exist as they pertain to the act of judicial review. One thing that has consensus is that the Constitution does not explicitly state that the courts have been granted the power. Where arguments begin to differ is on if the powers are implied. The discussion is further divided on how much authority is allowed under the implied power and if the original intent of judicial review has been increased over the years, giving the Court more power than it should have been given. On the complete opposite side of the argument, others believe that there is no implied power, nor is it constitutionally sound. The people who argue this believe that the Court has no authority at all to exercise this power. After conducting the review, the gaps that may need additional research revolve mainly around the argument about the origins of judicial review. Most scholars have accepted that judicial review is a necessary aspect of our republic, but it is still highly debated on the origins of judicial review. This question can be addressed by looking at the earlier courts and their use of judicial review.

Understanding the Argument

Before the constitutionality of judicial review is discussed, two things must first be established. For this argument, the first is that the original intent of the framers and original understanding of the people is used to interpret the constitutional text. Secondly, the context of

[33] Ibid.

judicial review in this argument is the ability for the Court to declare that certain aspects of the law are not consistent with the Constitution. In other words, for this purpose, judicial review is not the same thing as judicial supremacy. That is the idea that the Court has the final say on what law is.

To establish the intent of the framers and understanding of the people, several pre-constitutional cases will be discussed that demonstrate that judicial review in its purest form was not a new concept in the United States. While not all of them involve striking down a law that is contrary to the Constitution (in this case often state Constitutions), they do display that the Court acknowledged this power. These cases will be presented in sequential order.

Holmes v. Walton

To demonstrate the use of judicial review in a pre-constitutional America, the case of *Holmes v. Walton* will be broken down. This case will show the direct application of judicial review as the New Jersey Supreme Court struck down a law as unconstitutional. To establish how the Court did this, the facts of the case must be reviewed. On October 8, 1778, the New Jersey legislature passed a law to prevent the supply or assistance to enemy forces (British Troops) through the action of seizure. Not only did the act allow for seizure, but the person carrying the goods was to be brought before a justice of the peace immediately.[34] The law further stipulates that if the person hauling supplies were found guilty, the person or persons who seized the goods would divide it among themselves.[35] The jury was made up of six jurors, and if the jurors delivered a verdict, it could not be appealed; this is per the law that was passed on

[34] Austin Scott, "Holmes v. Walton: The New Jersey Precedent" *The American Historical Review,* no. 4 (1889) 456-469. https://www.jstor.org/stable/1833432
[35] Ibid.

February 11, 1775.[36] Taking advantage of the law that allows for seizure, Major Elisha Walton seized goods carried by John Holmes and Solomon Ketchum. This case was eventually tried, and with a jury of six men, a verdict was brought in favor of Major Elisha Walton. While the suit was still pending, the persons on trial had already appealed to the New Jersey Supreme Court.[37] After receiving the request, the Court decided to take up the case. The lawyer for the appellants argued that the law passed in 1775, allowing a jury of six men was in direct violation of the New Jersey Constitution.[38] After several months of deliberation, the Supreme Court came back with a verbal opinion that, in summary, said: given that the law passed in 1775 was contrary to the "Constitution" of New Jersey, the Court would reverse the decision of the lower Court.[39] Using the power of judicial review, the Court deemed the law unconstitutional and thus not applicable in the case of property seizure.[40] This case is critical because as the literature review demonstrates, several scholars argue that judicial review in the United States can be traced to the *Marbury v. Madison* opinion written by Chief Justice Marshall in 1803. Nevertheless, as the dates show, judicial review had already begun to take shape even before the Constitution's official draft.

Rutgers v. Waddington (1784)

In 1783 New York enacted a piece of legislation known as the Trespass Act, which was established to allow patriots to sue those who remained loyal to Britain for damages that resulted from the confiscation of property during the war.[41] This law provided Elizabeth Rutgers with an

[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Rutgers v. Waddington (1784)

opportunity to sue Benjamin Waddington for rent that she believed was owed to her during the time the British occupied her property. The attorney who took on the case on behalf of Benjamin Waddington was none other than Alexander Hamilton, one of the framers that believed that the judicial review was within the Court's power. In 1784, Alexander Hamilton argued before New York City's Mayor court that the Trespass Act of 1783 directly violated the treaty signed by the United States in 1783.[42] The judge ruled that the Constitution of New York, written in 1777, established the understanding of common law and recognized the law of nations.[43] What this meant was that because the Articles of Confederation had stated that no state may at any time abridge the right of the United States to declare or end war, and the United States lawfully entered a treaty under the authority of the federal government, the Trespass Act directly violated the rights of the federal government. This resulted in the judge stating that Ms. Rutgers was not entitled to any payment while the British government occupied her place.[44] This case is another clear demonstration of the applicable use of judicial review. Though the judge did not directly strike the law down, he decided to rule that the law was not consistent with federal law, so it would not be enforced.

Trevett v. Weeden

Another case that provides the pre-constitutional application of judicial review is the case of *Trevett v. Weeden*. This case offers a great example that covers a fundamental right to a jury. In 1786 the state of Rhode Island passed a legislative act which established a system of paper money. This system required that people accept this form or currency under penalty of law.[45] If

[42] Ibid.
[43] Ibid.
[44] Ibid.
[45] Howard Gillman, Mark A. Graber, Keith E. Whittington, "The Founding Era-Criminal Justice/Juries Lawyers" *American Constitutionalism* no. 2.

anyone were to refuse, they would be found guilty without the need for a jury. In this case, John Weeden was a salesman of meat, and he only did business in silver and gold. During a transaction, he refused the paper currency, and John Trevett brought this before the Court to seek the required penalty.[46] For his defense, John Weeden hired General James Varnum, a seasoned and respected lawyer. To argue this case, General Varnum stated that a right to a jury was a fundamental right, and the act that did not require a jury was in conflict with the Rhode Island Constitution, and thus the law was void.[47] This argument seemed to satisfy the Rhode Island Supreme Court as they ultimately ruled that the law was unconstitutional and that a jury was required.[48] Although an opinion was never officially published, James Varnum himself published a lengthy account that discussed both his argument and the decision by the Court.[49] This is a prime example of judicial review being utilized in a pre-constitutional era.

Bayard v. Singleton (1787)

This next case deals with a dispute over property and what the plaintiff viewed as an unlawful seizure.[50] This case started when Mr. Cornell, a loyalist to the British government, decided to return to Britain on August 19, 1775.[51] During his absence, his family remained in the United States at the time, still occupied by the British. In 1777, he returned but was refused entry because he refused to pledge allegiance to the newly created nation.[52] It was then that he decided

http://global.oup.com/us/companion.websites/fdscontent/uscompanion/us/static/companion.websites/9780199751358/instructor/chapter_3/trevettv.pdf

[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Bayard v. Singleton (1787)
[51] Ibid.
[52] Ibid.

to sign the deed to his property over to his daughter to ensure that she kept the property.[53] However, given the family loyalties to the British, the property was seized as they were considered the enemy. After the property was taken, the daughter sued for her right to the property in 1787. Her attorney Samuel Johnston argued that the confiscation acts violated the Constitution of North Carolina, requiring a jury trial if any property was to be in dispute.[54] Ultimately, the state Supreme Court ruled in favor of Ms. Bayard. They determined that the confiscation acts which seized her property as a citizen of the United States was in direct violation of the state Constitution and required the case to go before a jury.[55]

Putting it all Together

Although only four cases have been analyzed, a common theme has appeared. The first theme is that all these cases involved a dispute with a statute passed by the state government. They also had a court of some kind decide that the statue was either not in line with the state Constitution or, in one such case, federal law. In one form or another, all these cases had a judge issue an opinion that declared an act void or simply refused to enforce the law itself. Each of these cases has a uniqueness in the fact that they all occurred in separate states. This provides evidence that judicial review was a concept practice in many of the original colonies. Another common theme that has been found researching these cases is that scholars and historians cannot agree on which of the cases established the precedent that would eventually lead to the power of judicial review at the federal level. Although many scholars debate this topic, there has been little attention paid to these cases. The belief among most scholars is that judicial review is likely the result of *Marbury v. Madison.* However, if scholars were to look objectively at these cases, it

[53] Ibid.
[54] Ibid.
[55] Ibid.

would show that they provide proof of judicial review before the famous case in 1803. It is essential to review these cases and recognize its significance because it can be used to help settle the debate about the constitutionality of judicial review.

Articles in the Constitution

So far, this chapter has covered cases that pre-dated the Constitution utilizing judicial review. Now, the Constitution itself must be explored to build on the matter of the constitutionality of judicial review. The United States Constitution was created because many had realized that the United States would not survive under the construct of the Articles of Confederation. The Articles provided little power to the federal government and created a federal system that faced many challenges in dealing with foreign policy. This led to the founders calling for a Constitutional Convention. To understand the powers of the judicial branch, the purpose of the Constitution and intent of the founders must be understood. The founders created a system that was meant to provide checks and balances that would provide a stable central government and check the three branches to ensure that individual rights and liberties were not infringed upon. The founders envisioned a system that would be self-regulating and for the people. To ensure that the states would not pass any laws that would contradict this federal power, the founders wrote into the Constitution, the supremacy clause. This clause is found in Article VI, and it states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

> bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[56]

The supremacy clause plays a vital role in the Constitution as it establishes that the Constitution is the law of the land, and no law may be passed that violates the Constitution. In this clause, it states that this clause shall bound judges in every state. To make a case for judicial review's constitutionality, Article III can be examined with Article VI. Article III Section 1 states:

> The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.[57]

Article III Section 1 shows that the judiciary's power shall be vested in the Supreme Court and in inferior courts that are to be stood up by Congress. Article III Section 2 states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[58] If Article VI and Article III are looked at together, a reasonable argument can be made that the founders' intent was judicial review. The reasoning for this is that Article VI states that the Constitution is the law of the land, and this clause bounds judges from every state. This means that no law may be passed that conflicts with the Constitution. The Constitution then states that the judiciary's power will be vested in the Supreme Court and the inferior courts that Congress creates. Given

[56] U.S. Const. Art. VI
[57] U.S. Const. Art. III, § 1
[58] U.S. Const. Art. III, § 2

that the Constitution states that the judges are bound by the supremacy clause from all states, logic dictates that it is up to the judges to ensure that laws do not interfere with the Constitution. Logic dictates this because, in Section 2 of Article III, the Court's power extends to all cases of Law and Equity. If the Constitution is the law of the land, this would make the Constitution itself a law, which means that any case that deals with an act that is contrary to the Constitution falls within the judiciary's power. Since it is the responsibility of the Court to provide judgment on such cases and interpret the law, this here shows that the power of judicial review is implied in the United States Constitution, thus making it constitutional. This power was provided to the Court to make sure that the Constitution remained intact as it was designed to provide the checks on the government and protect the people's rights.

Original Intent/Understanding

Using Article III and Article VI of the Constitution, the argument has been made that when read together, the founders created a system that required the judicial branch to exercise judicial review. It has been shown that before the creation of the Constitution, many states had a judiciary system that utilized this power to strike down laws that were contrary to the state Constitution. This was established through the analysis of four pre-constitution cases. Looking at these cases, an argument can be created to show that the people of the states that ratified the Constitution had a fundamental understanding that judicial review was an implied power of the judiciary as outlined in Article III and Article VI. If it were the original understanding by the states that judicial review was an implied power, this would also demonstrate that judicial review is an implied constitutional power. To prove that this was an original understanding, a speech given by James Wilson at the Pennsylvania ratification convention will be summarized.

Additionally, a speech given by Oliver Ellsworth will be explored. Finally, some of the Publius papers written by the federalist and the Brutus papers written by the anti-federalists will be analyzed. Both famous writings mention the power of the Court.

James Wilson Speech

During the ratification process, James Wilson delivered a speech to the people of Pennsylvania. This was an effort to convince the state to ratify the new Constitution that James Wilson and the other delegates had created. In this speech, he states:

> I say, under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department. This I hope, sir, to explain clearly and satisfactorily. I had occasion, on a former day [November 24], to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.[59]

James Wilson's speech to the people of his state clearly shows an understanding of what is within the scope of judicial power. The Constitution grants the judiciary power over all cases in law and equity. This means that even the laws of the United States legislature fall within that scope. Here, James Wilson says that it is the judiciary's responsibility to declare acts unconstitutional if they violate anything within the Constitution itself. This demonstrates that when the Constitution was

[59] James Wilson, "Pennsylvania Convention Speech," December 1, 1787.

ratified in Pennsylvania, they had an original understanding that the judicial powers, as outlined in Article III Section 2 of the Constitution, clearly included the right to judicial review. His speech was intended to sell the Constitution to his state. He wanted to make sure his people understood that the federal government would not have unlimited legislative power as the non-partial branch of the judiciary would regulate it.

Oliver Ellsworth Speech

In January of 1788, Oliver Ellsworth delivered a similar speech to the people of Connecticut, as James Wilson delivered to Pennsylvania. In his statement, he states:

> This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.[60]

Like James Wilson, Oliver Ellsworth is telling the people of Connecticut that the federal government may not act beyond their powers that were provided in the Constitution. He is outright and direct in stating that it is up to the judiciary to determine the law's constitutionality. This again indicates that the power of the judiciary does grant them the power of judiciary review. These are just two examples of speech's that have been delivered to the individual states

[60] Oliver Ellsworth "Connecticut Convention Speech," January 7, 1788.

to get approval for ratification of the Constitution. The ratification process took nearly two years before securing enough states to make the Constitution the new form of government. During this time, papers written by both federalists and anti-federalists were circulating through New York. These papers were intended to make known the content that was within the Constitution. The federalists supported this new form of government as they believed that it was paramount to establish a strong central government if the nation were to survive. The anti-federalists were concerned that a strong central government would extinguish individuals' rights, and they did not support the new form of government. Though they had differing opinions on how the government was to be implemented, both sides acknowledged that judicial review was within the scope of the courts. This will be demonstrated as Federalist no. 78 and Brutus XI are broken down.

Federalist No. 78

Federalist No. 78 is an essay written by Alexander Hamilton that focuses explicitly on the judiciary. In this essay, he touches on the power of the judiciary and what these powers mean. This essay is often cited as one of the best arguments for justifying the constitutionality of judicial review. Federalist 78 begins by discussing how the judges of the judiciary are to be appointed. He then outlines how long they may hold their office and what can cause them to lose it.[61] As this paper progresses, he begins to discuss how the judiciary would be the least dangerous branch as they do not have the power of the purse, nor do they have the power of the sword. Here he says that the judiciary will have no means of making effective change but rather have the ability to make sound judgments.[62] He then discusses how important it is for the

[61] Federalist 78
[62] Ibid.

judiciary to remain separate from the other branches as this will be the best way to protect the liberties of the people.[63] Specifically, he states:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[64]

Here he clarifies that the judiciary must maintain separation and ensure that acts are not contrary to the Constitution. As mentioned, the purpose of this form of government was to create checks and balances to ensure that people's rights remained intact. It is impossible to enforce a Constitution if there is no independent judiciary who knows and understands the law, making those interpretations. Here Alexander Hamilton demonstrates that the powers granted to the judiciary within the Constitution provided them with the right of judicial review. To summarize, he thought it is on the judiciary's shoulders to act as the interpreter of the Constitution. He believed that if this did not occur, the legislature would be able to work against the Constitution, making the document itself useless. Alexander Hamilton demonstrates the Constitution itself is the means of separating the powers required by the judiciary to get involved to protect the rights. This shows that again though judicial review is not explicitly mentioned, it is necessary for our government.

[63] Ibid.
[64] Ibid.

Council of Revision Debate

Not every person in the Convention supported judicial review like Alexander Hamilton. In fact, during the Constitutional Convention, many debates took place regarding the role of the judiciary and how disputes would be handled regarding legislative acts. One such suggestion for how to handle these disputes was known as the Council of Revision. This "Council" would be composed of the executive and judiciary who would exercise a "veto" against national legislature. Among those who supported it were James Madison and James Wilson. James Wilson later supported judicial review, but that was after the Council of Revisions was voted down. Those who opposed the "Council" did so worrying that the veto would not require legal or constitutional need to use it.[65] Another argument against the Council of Revision was made by Elbridge Gerry who argued that judicial review would provide a sufficient check against encroachment, but if they were to be on the Council they would have to step into judging policy before a legitimate objection to the law was made. One argument made in favor of the Council was made by James Wilson. He felt that the Council of Revisions was superior because it provided a much broader scope for the executive and justices to defend against unjust or dangerous laws that may not be completely unconstitutional.[66] Despite the debate for or against the Council, one thing can be learned from these debates, which is that most framers saw the need for some form of judicial participation to place checks on the legislature. Ultimately, the proposal was unsuccessful, but did give way to the implied use of judicial review.

[65] Robert L Jones "Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance." Journal of Law & Politics 27 (3) 2012: 459–555. http://search.ebscohost.com.proxy1.library.jhu.edu/login.aspx?direct=true&AuthType=ip,shib&db=lft&AN=77245687&site=ehost-live&scope=site.
[66] Ibid.

Brutus XI

Anti-federalists who did not support the increased central powers of the union, wrote the Brutus papers. They believed that the Constitution would lead to governmental superiority over the states and leave them susceptible to tyranny. In Brutus XI, the author specifically addresses the power of the judiciary with some degree of concern. The papers' opening states: "The nature and extent of the judicial power of the United States, proposed to be granted by this Constitution, claims our particular attention."[67] Brutus XI paper begins immediately addressing that certain powers were granted to the judiciary as proposed by the Constitution. Later in the article, the author then states that the courts of the law will make decisions upon the Constitution and the laws made pursuant thereof.[68] This statement indicates that it is already in the realm of the Court to make decisions about the Constitution. Though this point in the paper does not explicitly mention that this means they possess the power of judicial review, it is building up to this point. Later in the essay, the author then discusses the powers of the judiciary. The powers that he addresses are the ones granted to the judiciary in Article III Section 2. The author looks at the powers and notices that they are separate, with the first one stating that the power will extend to all cases of law and equity that arise from the Constitution and the second one extending to the laws of the United States. Here, the author begins to argue that because they are separate, they must be two distinct types of cases. Here the author conveys that the framers intended to separate these different types of cases or else they would not have both been mentioned. Once he makes this connection, he then states: "The cases arising under the constitution must include such, as to bring into question its meaning, and will require an explanation of the nature and extent of the

[67] Brutus XI
[68] Ibid.

powers of the different departments under it."[69] He then concludes that if these cases require explanation and interpretation of the meaning, it must mean that it is within the power of the Court to provide such answers. This is a significant conclusion because Brutus XI was a paper that argued against the increased use of federal power and did not support this form of government. Still, even this author saw that by breaking down the Articles in the Constitution, it could be concluded that judicial review is necessary for the Constitution to work.

What it all means

Throughout this chapter, many documents have been reviewed that argue in favor of judicial review's constitutionality. Of these documents, four cases that took place in four separate states were discussed. These cases involved the judiciary utilizing judicial review to void a statute outright or refuse to enforce it in Court. The purpose of the four cases was to demonstrate that judicial review was a common practice in early American history before the writing of the Constitution. If this practice was known before the Constitution, it is reasonable to assume that the framers intended the power to continue in a federal system. Two articles of the Constitution were reviewed, the first being the supremacy clause and the second being the powers and the format of the Court. When the powers of the Court are analyzed, it was argued that they have the power of judicial review. The reason is that the Constitution granted the judiciary with authority over all cases of law and equity, and according to the supremacy clause, the Constitution is the supreme law. Knowing these facts, it is reasonable to consider that it is within the power of the Court to render judgment on all cases that may contradict the Constitution. Finally, speeches and essays were reviewed, all of which indicate that judicial review is an intended power of the

[69] Ibid.

judicial as outlined in the Constitution. With this historical evidence, the only conclusion that can be drawn is that the judiciary always possessed this power, and it is constitutional even if it is not explicitly mentioned in the Constitution itself. The question now is if it is an intended power, why was it that it was not recognized as a continuous power until Chief Justice Marshall wrote the opinion of *Marbury v. Madison*? Many scholars believe that the power was not intended to be utilized unless the laws directly violated the Constitution. It was not until 1803 that the Court faced this problem.

Conclusion

The purpose of this chapter was to determine if judicial review was Constitutional. There is still an ongoing debate about this topic. Some scholars believe that it is constitutional, and they base this off the ruling and interpretation written by Chief Justice Marshall. Other scholars feel that judicial review is inherently undemocratic and thus unconstitutional. This chapter's findings have concluded that judiciary review is constitutional and was established before the *Marbury v. Madison* decision. This is contrary to what many scholars have argued but does re-affirm the findings of other scholars.

Chapter 2: Judicial Supremacy

In the previous chapter of this thesis, it was argued that the United States Supreme Court possessed the power of judicial review. This power allowed the Court to interpret the Constitution and its amendments therein and utilize that legal understanding to strike down laws or uphold them. Through research, it has been determined that despite the Constitution not explicitly stating this power, it is implied as the framers' intent based on historical data and speeches provided by the framers. With this determination, the next question that must be addressed is: With the Courts possessing the power of judicial review, do they also have the power of judicial supremacy? To better understand this question, one must first understand the definition of judicial supremacy in this context. For this argument, judicial supremacy is the Court possessing ultimate authority on the interpretation of the Constitution and final say on the validity of the law under the Constitution. This chapter will show judicial supremacy exists to some degree in the United States. In other words, this paper will show that in certain circumstances, when the right conditions exist, the Court can and will have the final say on matters regarding the Constitution. This chapter will show that the Courts right to judicial supremacy depends on what case they are deciding, the president's desire to support that decision, and how the citizens react to the decision. The format of this chapter is as follows; it will first have a literature review that looks at the different schools of thought surrounding this topic. Next, the findings of the research will be presented. Specifically, the evidence will focus on cases where many believe judicial supremacy exists. The evidence will look at previous presidents and Congress members who have argued in favor of or against judicial supremacy. Finally, an analysis of the findings will be discussed.

Literature Review

Following the Dred Scott Decision in 1857, a firestorm of debate kicked off, which addressed the finality of a Supreme Court decision. This finality in legal jargon is judicial supremacy or the idea that the ruling of the Court is final. Abraham Lincoln primarily led this debate, though he was a lawyer from Illinois at the time. In his argument, he stated that rulings are binding in case-specific issues but questioned the finality on the overarching issue.[70] Lincoln is not the only one who has questions regarding judicial supremacy. This literature review will help establish current schools of thought on judicial supremacy. Specifically, this chapter will explore three leading schools of thought. These areas include: Judicial Supremacy does not exist; judicial supremacy does exist; and finally, the existence of judicial supremacy is a mixture.

As stated in the introduction, there are many schools of thought that surround judicial supremacy. Many scholars have looked to research this because there has been ongoing debate dating back to our country's earliest times. The first school of thought that will be explored is that judicial supremacy does not exist. A well-known scholar that supports this school of thought is Richard H. Fallon Jr. He supports this school of thought in his article "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age." This article discusses judicial supremacy and argues that we do not live under a system that warrants pure judicial supremacy.[71] This article argues that we currently live under a hybrid system of judicial supremacy, departmentalism, and populist constitutionalism. This argument means that the Court's power of judicial supremacy only goes as far as the president, Congress, and the people are willing to allow.[72] In Richard H. Fallon's thesis, he utilizes examples of current situations and

[70] Michael Stokes Paulsen, "Lincoln and Judicial Authority" *Notre Dame Law Review 83,* no. 3 (2008): 8
[71] Richard H. Fallon Jr., "Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age." *Texas Law Review 96,* no. 3 (2018): 487–553. http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=127975884&site=ehost-live&scope=site.
[72] Ibid.

those in the past to help illustrate that we live in a mixed bag society.[73] He argues that Republicans attempt to nominate justices who will overturn Roe v. Wade. He also argues that Democrats may attempt to do the same to overturn decisions they do not agree with, such as Citizen United v. Federal Election Commission. He also argues that Abraham Lincoln sought the overruling of Dred Scott and Franklin Roosevelt against Lochner v. New York. Though this article does acknowledge that under perfect conditions, the Court can have supremacy, it also argues that the power will only stretch as far as the different branches and the people allow. The next article that argues that judicial supremacy does not exist is the article "Judicial Supremacy Revisited." This article explores the legitimacy of judicial supremacy as an actual capability of the Court. The author of this article, Mark A. Graber, is one of the country's leading constitutional scholars, and he argues that judicial supremacy is overhyped in the modern era. He suggests that evidence demonstrates that the Court cannot enjoy full judicial authority.[74] Dr. Graber claims through his research; he found that constitutional authority is often placed in lower courts and the hands of elected officials.[75] Especially if they can justify defying a precedent to protect other constitutional authorities. Dr. Graber also argues that because the Court has no way of knowing all the constitutional decisions that are made, they cannot directly enforce or claim full supremacy.[76] Essentially, this falls under the same school of thought because it is saying that the branches of government and the lower courts and local authorities could ignore the Court because the Court has no real way of enforcing the rulings. The final article that argues that judicial supremacy does not exist is "Judicial Supremacy Has its Limits." In this article, John

[73] Ibid.
[74] Mark A. Graber, "Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice." *William & Mary Law Review 58*, no. 5 (2017): 1549–1607. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=123102662&site=ehost-live&scope=site.
[75] Ibid.
[76] Ibid.

Yoo, a constitutional scholar who has clerked with Justice Clarence Thomas, argues that despite many believing the rulings of the Court is settled law, it is, in fact, not.[77] Mr. Yoo argues this by saying that because the Constitution grants powers to each branch, including enforcing and upholding the Constitution, each branch has the responsibility of interpretation.[78] This means that it does not fall entirely on the Court, and therefore they cannot possess full supremacy over their rulings. This theory is known as departmentalism.

The last section covered the first school of thought, which was the idea that judicial supremacy did not exist. Though the authors differed slightly in what judicial supremacy was, they all agreed that often decisions were left to legislatures, lower level courts, and people. The next area that is to be explored is the school of thought that judicial supremacy exists.

The first article that explores the thought that judicial review exists is the article "In Defense of Judicial supremacy." This article sets out to argue that judicial supremacy exists because it must exist. In other words, Erwin Chemerinsky, a constitutional scholar and Dean of Berkeley Law, argues that because the members of the federal government have little incentive to follow the Constitution, an entity, i.e., the Court must exist to be the arbiter/enforcer of constitutional law.[79] For this to happen, judicial supremacy must exist. Mr. Chemerinsky is arguing that judicial supremacy is a necessary function of our government to ensure that the Constitution's rights are protected. He argues this by claiming that the framers knew that the sudden fear and feelings of the masses might result in the willingness to give up liberties and freedoms. This, in turn, is why the Constitution is so hard to alter and why the Supreme Court

[77] John Yoo, "Judicial Supremacy Has Its Limits." *Texas Review of Law & Politics 20,* no. 1 (2015): 1–27. http://search.ebscohost.com/login.aspx?direct=true&db=tsh&AN=113146282&site=ehost-live&scope=site.
[78] Ibid.
[79] Erwin Chemerinsky, "In Defense of Judicial Supremacy." *William & Mary Law Review 58* no. 5 (2017): 1459–94. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=123102660&site=ehost-live&scope=site.

must protect it. The next article, "Soft Supremacy," takes a different look at the existence of judicial supremacy than the first article. However, they still acknowledge that it is the right of the Court. This article takes a fascinating look at the existence of judicial supremacy. It does this by addressing the arguments people make about departmentalism and popular constitutionalism. Corinna Lain, constitutional scholar and Associate Dean of Faculty Development at Richmond school of law does this when she restates the arguments. Specifically, she restates the argument that departmentalist make: the elected officials have an equal say in the interpretation of the Constitution.[80] She also restates the argument that popular constitutionalists make: the people should have a say in these big decisions.[81] By restating this argument, Corinna Lain argues that though the Court enjoys the final say on what is constitutional, it is the people and the elected officials that help mold the Court to make these decisions. In other words, Corinna Lain argues that because the president nominates the justices and the Senate confirms them, the rulings of the Court will almost always be in line with the will of the people. In other words, she argues that judicial supremacy exists because the will of the people is upheld in the rulings based on the way the Court is nominated. This concept is known as Soft Supremacy. Ms. Lain further proves this point using the 2016 election. The right for the president to nominate justices was one of the key points that was brought up during the 2016 election.[82] Each side argued that it was going to be vital because it would determine the Court's balance. This shows that the will of the people was at the forefront of the conversation when discussing the Court. The final article, "The Problem with Judicial Supremacy," written by Dr. Matthew J. Franck, acknowledges the existence of judicial supremacy but argues against the need for it. This article uses the case of Obergefell v.

[80] Corinna Barrett Lain, Soft Supremacy." *William & Mary Law Review 58* no. 5 (2017): 1609–88. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=123102663&site=ehost-live&scope=site.
[81] Ibid.
[82] Ibid.

Hodges, which constitutionalized same-sex marriage as the basis for his argument. In his article, Dr. Franck categorized judicial supremacy into three categories. The first was judicial supremacy of imperial power, which means that the Court is insulated from politics and thus is best suited to use the constitutional generalities to generate a legal argument.[83] The second is judicial supremacy of textual breadth, which means the Court can interpret any textual provisions of the Constitution.[84] The third is judicial supremacy of authoritative depth, which is the most understood definition. This definition is that the law is what the Court says it is. In other words, the Court has the final say.[85] Ultimately, regardless of the three decisions, Dr. Franck argues that judicial supremacy exists, but it has become a mechanism for political activism.

The final school of thought that will be explored in this literature review is the thought that judicial supremacy exists but in a mixed degree. The first article to explore is "Why Congress Does Not Challenge Judicial Supremacy." The author, Neal E. Devins, constitutional scholar and Law Professor at William & Mary Law School argues that judicial supremacy can exist in the United States because the legislative branch does not challenge it. He argues that often Congress is not worried about the legal interpretation of things and gives very little thought into the constitutionality of the laws they make.[86] Mr. Devins also argues that Congress lacks the will and desire to fight the Courts.[87] While on the other hand, by the president's right to execute laws, they have the power to ignore the Court. He suggests that judicial supremacy only exists when one of the other two branches is not willing to fight the Court. Ultimately, he argues that

[83] Matthew J. Franck, "The Problem of Judicial Supremacy." *National Affairs 27* (2016): 137–49. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=114133648&site=ehost-live&scope=site.
[84] Ibid.
[85] Ibid.
[86] Neal Devins, Why Congress Does Not Challenge Judicial Supremacy." *William & Mary Law Review 58*, no. 5 (2017): 1495–1548. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=123102661&site=ehost-live&scope=site.
[87] Ibid.

judicial supremacy may exist only when the branches acknowledge or fail to fight against its existence. The next article has similar thoughts, but it looks at the polarization of politics as the cause for fading judicial supremacy. This article is titled "Judicial Supremacy and the Structure of Partisan Conflict." The article goes into detail about two different frameworks of constitutional power. These two frameworks are grand constitutional theory and regime power theory.[88] Grand theory is the thought that the Court acts outside of the people, while the Regime theory believes that it is through political frameworks that the Court makes decisions. Regardless, Dr. Graber argues that both frameworks see judicial supremacy as the power of the Court.[89] However, he also argues that in the modern era of the Court and the vast polarization of the country, the Court is often found advocating on both sides of the political spectrum and will often overrule their rulings. Thus, he argues that judicial supremacy may not be as fully intact as Courts of the past.[90]

After extensive research and looking at the different schools of thought, additional research must be done to determine the scope of judicial supremacy. Specifically, additional research needs to be placed in the Constitution itself. Most of these articles focused on an already existing judicial supremacy (or lack thereof), and not so much on the document that would grant the power. Documents written by the framers could also shed some light on the issue of judicial supremacy. These documents could provide the original intent of the framers when creating the different branches of government. Finally, some former Supreme Court cases would need to be studied to demonstrate how often the Court truly enjoyed supremacy. Though these scholars

[88] Mark A. Graber "Judicial Supremacy and the Structure of Partisan Conflict." *Indiana Law Review 50* no. 1 (2016): 141–79. http://search.ebscohost.com/login.aspx?direct=true&db=asn&AN=120676201&site=ehost-live&scope=site.
[89] Ibid.
[90] Ibid.

provided some degree of insight into some of the areas such as cases, they were not explored deeply to prove the existence or lack of existence for judicial supremacy. One thing that can be guaranteed is if judicial supremacy did not have some merit, it would not be a topic of discussion today. With that said, this thesis does not embrace or explore the idea that judicial supremacy is entirely non-existent. To determine the extent of judicial supremacy, additional research will be de done. Specifically, this research will investigate case law that addresses judicial supremacy. Additional analysis of the Constitution will be done, and it will be combined with the understanding of constitutional scholars. Finally, historical documents written by the framers will also be assessed. This chapter will fill in the gaps of previous research regarding judicial supremacy.

Presentation of Results/Analysis

Historical Documents

The United States Constitution

Like any other power possessed by those in the United States government, the first place to find its origin is in the Constitution of the United States. This document is the basis for all ceded powers to the federal government. For this topic, the area that is covered is Article III of the United States Constitution. In this article, the power of the judicial branch is mapped out. As a reminder, the question that is being addressed is if the Supreme Court has the power of judicial supremacy. Naturally, the first place to see if this power is ceded to the Court is in the Constitution itself.

In Article III Section 1, the Constitution states that "judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress from time to

time ordain and establish.".”[91] This first section establishes that judicial power is granted but it does not specify to what degree. It is in the second section that this becomes clearer, in which the Constitution says that “judicial power will extend to all cases, in Law and Equity, arising under this Constitution.”[92] In other words, it is saying that all judicial power is vested in the Supreme Court. This vested power is for the Court to deal with all cases dealing with matters of law that may arise under the Constitution itself. This clearly shows that the Supreme Court has the authority to hear cases that deal with matters of the law, especially those that deal with matters of the Constitution. This interpretation was shared by Chief Justice John Marshall, who made a similar argument when hearing *Marbury v. Madison*, the case most famous for furthering judicial review's power.[93] This interpretation was also one that was accepted by both the Federalist and Anti-Federalist during the ratification of the Constitution. In Brutus 1 and Brutus 11, written between October 1787 and January 1788, the Anti-Federalist argue that the Constitution provides too much power to the Supreme Court because they have the authority of all cases of law.[94] Specifically, those that deal with the interpretation of the Constitution. In Brutus 11, the writer goes as far as to suggest that the Court will not be held accountable for its actions and will have the power to change the law as they see fit.[95] These early interpretations provide insight into the known power of the Court. However, does this mean that the Court possesses ultimate authority? It does not clearly state that the Supreme Court has supremacy over the cases; rather, it is vested in the Court. So, the argument cannot be made looking strictly at this section. However, there can be an argument made when this article is read in conjunction with Article VI Section 2. This

[91] U.S. Const. art. III, § 1
[92] U.S. Const. art. III, § 2
[93] Marbury v. Madison, 5 U.S. 137
[94] Brutus 1, October 18, 1787
[95] Brutus 11, January 31, 1788

particular area of the Constitution establishes that the Constitution is to be the supreme law of the land.[96] What this means is that one could reasonably think that if judicial power is vested in the Supreme Court and judicial power extends to all cases dealing with laws under the Constitution, that the Courts possess judicial supremacy. This argument is made because if the Constitution is a law and the Court has the power to hear cases dealing with law and the Constitution is the supreme law, then the decisions that the Court makes regarding the Constitution are supreme. However, this argument can also be refuted based on other articles written in the Constitution. For example, Article I Section 8 of the Constitution states that Congress has the power to make laws to ensure proper execution of powers outlined in the Constitution.[97] Furthermore, in Article II Section 3, it discusses that the president has the responsibility to "take Care that the Laws be faithfully executed."[98] This demonstrates that each branch has some responsibility in executing the powers of the Constitution. This argument is referred to as departmentalism and was supported heavily by President Thomas Jefferson. Thomas Jefferson's thoughts regarding departmentalism are covered later in this chapter. Evidence has provided a very murky picture of judicial supremacy; on the one hand, it appears that based on Article III and Article VI, the Supreme Court may possess judicial supremacy. On the other hand, when the powers of the other two branches are considered, everyone may have a hand in determining the constitutionality of a law. The next step is to look at some written papers of the framers.

Federalist 78

As it has been demonstrated in the last section of this chapter, there is no way to definitively prove that judicial supremacy is a legitimate power by strictly examining the

[96] U.S. Const. art. VI, § 2
[97] U.S. Const. art. I, § 8
[98] U.S. Const. art. II, § 3

Constitution. Because of this, the next step is to look at the intent of the framers during the time that the Constitution was written. The best way to do this is to examine some of the framers' writings at the time. The first paper that will be examined is Federalist 78. This paper is an essay that was written when the Constitution was going through the ratification process. In this paper, Alexander Hamilton directly addresses the Court's role in this new form of government. In Federalist 78, Alexander Hamilton states in not so uncertain terms that the Supreme Court is the least dangerous branch of the United States.[99] This argument is made because he claims that the Court possesses neither the power of the purse nor the power of the sword. What Hamilton is saying here is that the Court cannot become dangerous because they do not have the power to enforce their judgment nor supply funding to enforce the rule. This falls on the legislative and executive branches. This would indicate that the Court cannot possess judicial supremacy because they do not have the power to enforce their judgment. However, like the Constitution, there is another section in this paper that indicates that they may have some degree of judicial supremacy. Specifically, this paper asserts that the "interpretation of the laws is the proper and peculiar province of the courts."[100] It furthers states that the Constitution must be regarded as fundamental law, and therefore it belongs strictly to the Court to ascertain its meaning.[101] Here Hamilton seems to argue that it is the sole responsibility of the Court to interpret and pass down a judgment of the Constitution. This meaning fits perfectly within the definition of judicial supremacy. Unfortunately, this still does not provide enough evidence to suggest that the Court possesses complete judicial supremacy. The reason is that the paper shows that the Court cannot enforce its judgment but instead relies on the power of the president. Another reason is that even

[99] Alexander Hamilton, “Federalist No. 78”
[100] Ibid.
[101] Ibid.

further down in the paper, Hamilton discusses that neither the Court nor the Legislative branch possesses higher authority than the other, but rather the ultimate authority is to the people of the nation. This means that the people will ultimately possess the authority and not those of the different branches.

Federalist 81

Much like Federalist 78, Alexander Hamilton addresses the power of the Court in Federalist 81. In Federalist 81, Alexander Hamilton quotes directly from the then-proposed Constitution, stating "that the judicial power shall be vested in one Supreme Court."[102] He then states that there needs to be "one court of supreme and final jurisdiction."[103] Here, Hamilton is directly saying that the Court will possess a final say on matters of law under the Constitution. However, like Federalist 78, he offers an exception to this, stating that this final jurisdiction applies only to that case and that the legislative branch may make a law with new rules. Here it seems that Hamilton acknowledges the idea of a case by case understanding. This is a similar understanding that President Lincoln had with the Dred Scott Case. Regardless, it seems that by looking at the different documents, there is a common theme. This theme is that judicial supremacy may have a place in the Court, but it does not seem to be as finite as some may believe. To this point, the Constitution of the United States and a few Federalist papers have been analyzed. In these documents, one of the biggest influences of judicial supremacy rests in the hands of the president. The reason is that the president has the power and duty to execute all laws under the Constitution. This includes the decisions of the Supreme Court. To determine if

[102] Alexander Hamilton, "Federalist No. 81"
[103] Ibid.

judicial supremacy is a power vested in the Supreme Court, it is necessary to look at how different presidents have handled Supreme Court decisions.

Historical Document Analysis

There have been many different pieces of evidence presented so far. The first area of evidence that has been addressed includes several different historical documents. The first document covered was the United States Constitution. This document is the very document that provides the powers to the United States government officials. After looking at the evidence, it can be clear that the Supreme Court should enjoy a certain degree of supremacy. In other words, they are the foremost authority on law and should have some degree of say in what law is. Despite them being the primary authority on the law, it is through the power of Congress that the Court has its budget to function. It is also through the power of Congress that the makeup of the Court is determined. In other words, Congress can dictate how many justices sit on the Court. This gives Congress some degree of power in the judicial process. Furthermore, Congress also can determine who sits on the bench through the Senate's constitutional responsibility to advise and consent to a nomination. These actions would give Congress some degree of power to undermine pure judicial supremacy. Because the language of the Constitution grants each branch some degree of responsibility in constitutional matters, it is hard to justify a pure form of judicial supremacy. The next historical document that helped provide insight into judicial supremacy was the Federalist papers. In these papers, Alexander Hamilton seemed to argue toward a hybrid system that granted the Supreme Court supremacy but also stated that the other branches had a role. Together, these historical documents support the argument that judicial supremacy does not exist in a pure form but rather is a hybrid of supremacy and dependent on the support of the other branches.

Presidential Opinions

Thomas Jefferson

During the change of power from President Adams to Thomas Jefferson, there arose an issue that would go down in history as one of the most critical aspects of our current government. This issue is referring to the infamous case of *Marbury v. Madison*. This case came about because, during the last hours of President Adams's presidency, he attempted to stack the courts with as many Federalist sympathizers as possible. However, in one such commission, the papers were not properly delivered. As such, it was argued that the commission was not valid. This ultimately ended up in the Supreme Court. Chief Justice John Marshall published his opinion that the person who received the commission to the judgeship was entitled to his commission even though the commission had not been adequately delivered. However, knowing that President Jefferson would likely ignore the ruling, Chief Justice Marshall also argued that under the Constitution, the Supreme Court did not possess authority to hear the case. The reason is because they did not have original authority over the case, and it should have gone to a smaller court first. Doing this, he struck down the Judicial Act of 1789 stating that it was not in line with the Constitution. The attitude that Thomas Jefferson took was that he believed that each branch had some degree of say in what was meant to be constitutional. Because he intended to ignore the ruling if Chief Justice Marshall ruled against him, it demonstrates that the Court may not possess ultimate supremacy. In fact, Chief Justice Marshall's actions of voiding a law to avoid being ignored by the president also show this. Thomas Jefferson's justification for potentially ignoring the court is found in a letter he wrote several years later. In this letter he stated that all three "departments has equally had the right to decide for itself what is its duty under the

Constitution, without any regard to what the others may have decided for themselves."[104] In other words, Thomas Jefferson, the President of the United States, said that he would not follow the Supreme Court ruling as he believed the Constitution provided each branch with separate powers to provide checks. Thus, each branch has a responsibility to interpret the Constitution. This is a prime example of how a sitting president can overrule the Court. This also demonstrates to the degree that the Court does not possess total and complete judicial supremacy.

Andrew Jackson

Another well-known person in American history is President Andrew Jackson. He also addressed the issue of judicial supremacy and questioned its standing as constitutional. This questioning came when he vetoed a request to renew the Second National Banks charter. This veto is essential because, in 1819, under the case *McCulloch v. Maryland*, the Supreme Court ruled that Congress had the power to establish this bank as it fell under the powers to regulate interstate commerce. When he vetoed the charter, many felt that he acted against the will of the Court as they decided it was within the power of Congress to establish this bank. After vetoing the request, he argued that the Court is not always the final arbiter of the Constitution. Explicitly, he stated,

> It is as much the duty of the House of Representatives, of the Senate, and the president to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over

[104] Thomas Jefferson "From Thomas Jefferson to Spencer Roane, 6 September 1819" *Founders Online, https://founders.archives.gov/documents/Jefferson/98-01-02-0734*

> Congress than the opinion of Congress has over the judges, and on that point, the president is independent of both.[105]

President Jackson makes it clear that his action is defensible because he believes that it is the prerogative of the president under the powers granted to the office to determine that his action was constitutional. As this demonstrates, there have been at least two presidents who felt that the powers to interpret the Constitution falls within the duty of each branch.

Abraham Lincoln

The first two presidents demonstrate an example of departmentalism. This next president demonstrates a hybrid understanding: the Court has supremacy in each case but not on the overarching issue. The person that argued this was President Lincoln while he was still serving as a lawyer in Illinois. He argued that though the Court possesses the power of supremacy, it is only specific to that case and not all cases arising under law.[106] This argument was made regarding *Dred Scott v. Samford.* It was the opinion of Abraham Lincoln that this case did not and should not establish precedent for all other matters affecting the citizenship of African Americans.

Presidential Opinion Analysis

As the section above demonstrates, historical documents are not the only thing that provides evidence to support the argument of hybrid judicial supremacy. The actions of a few notable presidents also supports the argument. Going back to early times in American history, a

[105] Andrew Jackson, "President Jackson's Veto Message Regarding the Bank of the United States, July 10, 1832, retrieved from https://avalon.law.yale.edu/19th_century/ajveto01.asp

[106] Michael Stokes Paulsen, "Lincoln and Judicial Authority" *Notre Dame Law Review 83,* no. 3 (2008): 8

few notable presidents have resisted the rulings of the Court. This resistance came in the form of departmentalism, which is the idea that all three branches have a responsibility to determine what was constitutional. The first president who argued this was Thomas Jefferson. He believed that it was the responsibility of each branch as a representative of the people to act in the best interest of the people and determine what was constitutional. This, of course, resulted in him threatening to disobey the Court. This provides a great example of a hybrid system that only extends supremacy to the Court if they have the support of the other branches. This hybrid system is seen in the other examples of President Lincoln and Jackson, whom both argued for departmentalism and often ignored the ruling of the Courts.

Supreme Court Cases

So far, after examining many historical documents and the opinions of several famous presidents, it has been challenging to establish pure judicial supremacy. To this point, what has been found is that the Court may possess a certain degree of supremacy with different measures in place for Congress or the president to overrule the Court. The next step in this process is to examine different cases that help establish a basis for supremacy.

Marbury v. Madison

In the case of *Marbury v. Madison*, Chief Justice Marshall published an opinion that the Supreme Court must determine what law is. In other words, the Court must state if a law is constitutional as the Constitution is the supreme law of the land. Many may see this as an argument for judicial supremacy, making the argument that the Constitution is supreme, and thus the Court has the final say of law. However, as shown above, the Constitution still grants the other branches with specific powers to help frame the law within the Constitution. This shows

that the Court, while the primary authority on the Constitution, does not have ultimate authority. This was demonstrated when Thomas Jefferson threatened to ignore the opinion of Chief Justice Marshall.

Cooper v. Aaron

There seems to be a misunderstanding of judicial review and judicial supremacy. Many scholars have concluded that because of judicial review, the Court must possess judicial supremacy for legitimacy. However, it was not until the case of Cooper v. Aaron that judicial supremacy was linked in such a manner. In this case, Arkansas sought to delay the ruling of *Brown v. Board of Education* through the amendment of their state Constitution, which opposed desegregation.[107] This attempt to delay the ruling resulted in this case ending up in the Supreme Court. When this case was heard the opinion was unanimous and stated the following:

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of

[107] Cooper v. Aaron, 358 U.S. 1 (1958)

> the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[108]

What this opinion is attempting to do is establish the idea that because the Court must interpret the Constitution, and the Constitution is the supreme law of the land, the Courts have supreme authority over all matters of law. It is this case that makes the most compelling argument toward judicial supremacy. This case was able to accomplish supremacy as it pertained to the original *Brown v. Board of Education*. However, it does not provide enough backing to support a full definition of judicial supremacy. Instead, it was the basis for the modern understanding of judicial supremacy.

Roe v. Wade

One could argue that if judicial supremacy were legitimate, it would cease all actions to pass laws that would undermine the Court's ruling. However, in the case of abortion, several laws have been passed following the landmark decision. An important thing to remember is that though laws have passed, many have been challenged in the Supreme Court and have been struck down or altered to fit specific Court criteria. *Roe v. Wade* was a decision that essentially "constitutionalized" the right to abortion using the justification of the right to privacy, which the Court said could be found in the 14th amendment.[109] However, despite the Supreme Court ruling, many states have passed laws that look to limit or restrict access. Some have even succeeded in creating more significant limitations, which resulted in the viability rule. Which moved from allowing most second-term abortions to limiting it to fetal viability, which has become more restrictive as science has progressed. This is not the only time that the law was

[108] Ibid.
[109] Roe v. Wade, 410 U.S. 113 (1973)

challenged. Recently, especially in 2019, several states have passed laws that highly restricted or outright banned abortions. This was a result of the balance of the Court shifting following the successful nomination and appointments of Justice Kavanagh and Justice Gorsuch. Many of these laws were known as "heartbeat" laws that effectively banned abortion after the detection of a fetal heart rate.[110] Though these laws have not gone into effect because of lower court battles, many legal experts think that this could unravel the very decision of *Roe v. Wade*. In this very complex and decades-long legal struggle, there seems to be some disagreement among state and federal government officials about the legitimacy of judicial supremacy.

Supreme Court Cases Analysis

Some analysis has already been done in the above paragraph addressing these cases. The three cases used as evidence in this chapter were *Marbury v. Madison*, *Cooper v. Aaron*, and *Roe v. Wade*. In the first two cases, they established or codified known powers of the Court into law through case precedent. What this means is that these cases were known to make judicial review entirely accepted. This was done in *Marbury v. Madison*. The second case was thought to have legitimatized judicial supremacy because the opinion was able to link *Marbury v. Madison* and Article VI of the United States Constitution to the Supreme Court. As argued in the historical documents section, when one looks at Article III and Article VI of the Constitution, it may be reasonable to think that the Court possesses supremacy. This was the argument made in *Cooper v. Aaron*. Unfortunately, like history has shown, to possess supremacy, the Court needs to enjoy the support of the president and the legislative body. The last case of *Roe v. Wade* is a primary example of this as it does not have the full support of the people, the president, or

[110] K.K Rebecca Lai, "Abortion Bans: 9 States have Passed Bills to Limit the Procedure this Year", *The New York Times,* March 29, 2019, https://www.nytimes.com/interactive/2019/us/abortion-laws-states.html

the legislative body. As a result, there have been numerous challenges to this precedent, which has resulted in the original opinion being altered and may one day result in total override. Ultimately, the purpose behind this is to demonstrate that without the power of the purse and the power of the sword, the power of the Supreme Court is limited.

Conclusion

Throughout this chapter, evidence has been presented to support the idea that pure judicial supremacy does not exist. This was done through the analysis of several historical documents to include the Constitution. Comments and actions of former presidents were also analyzed. Finally, some Court cases were broken down, which demonstrated that some challenges are still occurring today despite the rulings. This process has proved that the United States Constitution, which provides checks and balances, has done just that. This means that because the Court relies on the other branches to enjoy supremacy, it does not possess pure supremacy. Instead, it is a hybrid system that allows the Court to be the final arbiter when the other branches feel that the Court must have that power.

Chapter 3: Court Legitimacy

Alexander Hamilton in Federalist No. 78 reminds critics that the judicial branch will be the least dangerous branch because it has neither the power of the sword nor the purse. This chapter focuses on addressing this issue to determine if the Court is still the least powerful. In this chapter, this idea will be explored as it addresses the idea of legitimacy. Any powerful government organization must be viewed as legitimate.

In this history of the United States, on several occasions, the United States Supreme Court's legitimacy has been called into question. One example is when the Supreme Court was inserted into the 2000 Presidential election. In this ruling, the Supreme Court ruled by a 5-4 margin in favor of President Bush. Essentially, the Court at that time had their legitimacy called into question because many argued that the Supreme Court's conservative body had stolen the election from someone who won the popular vote. The Court also faced a legitimacy question when the Court had to rule on the newly signed Obamacare law. Now with President Trump in office, some reporters and scholars are calling the Court illegitimate. The reason is that these critics state that because President Trump did not win the popular vote and was able to nominate Justice Neil Gorsuch, his nomination was illegitimate.[111] This assertion goes further to state that his illegitimate nominations skewed the Court toward conservativism, which was not in line with the popular majority.[112] In one New York Times article, the author Michael Tomasky argues that President Trump's nominee could not be the will of the people because he was nominated by a president who did not win the popular vote and was narrowly confirmed by a Senate that had

[111] Michael Tomasky, "The Supreme Court's Legitimacy Crisis" *The New York Times,* October 5, 2018, https://www.nytimes.com/2018/10/05/opinion/supreme-courts-legitimacy-crisis.html
[112] Ibid.

fewer votes than those who voted against the nomination. The author further argues that Clarence Thomas and Samuel Alito are also in question because though they were nominated by presidents who won the popular vote, their Senator support still did not have more votes than those who voted against them.[113] Looking at these assertions, it is crucial to analyze the Court and determine if it is losing legitimacy.

This chapter will take an extensive look into the legitimacy of the Court and answer the following question: Is the Supreme Court losing legitimacy? The best way to address this question will be to explore the different schools of thought on how the Court maintains legitimacy. To accomplish this, the schools of thought will break down into the following categories: Policy disagreements impact legitimacy; the Positivity Theory can explain the legitimacy of the Court, and Polarization of the Court impacts legitimacy. This is completed in the literature review section. Following the literature review, this study will focus on the school of thought about the Court's polarization, impacting legitimacy. Specifically, this chapter will argue that the Court still maintains legitimacy at this time because it has not fallen too deep into polarization. This will be accomplished through several sections. The first section will look at the confirmation process of Supreme Court Justices. This section will demonstrate that there is an increasing polarization of the confirmation process and a decrease in supermajorities in Senate confirmations. The second section will look at the raw data regarding the Supreme Court rulings. Specifically, it will look at a breakdown of the Court from the period of 1970-1993 and 1994-2017. The year groups are broken up like this to demonstrate how America began to see a shift toward hyperpolarization. Following this, a brief look into the role of the Chief Justice in maintaining legitimacy is assessed. Finally, the study will explore the relationship between the

[113] Ibid.

Court with Congress and the president. This relationship should provide some insights into if the Court is, in fact, polarized or if it maintains a steady relationship with the different branches of government.

Literature Review

In Justice Stephen Breyer's book Making our Democracy Work, he states: "The Court has a special responsibility to ensure that the Constitution works in practice."[114] He goes on to argue that civic values play a critical role in maintaining public confidence in the Court. However, he does not stop there; he understands that civic values are important, but he also understands that the Court must "help maintain public acceptance of its own legitimacy."[115] Here, he states that though part of the legitimacy of the Court must be passed on through civics, the Court's actions impact their legitimacy. The purpose of this review is to explore the different schools of thought on how the Court's legitimacy can be impacted. The first school of thought is the idea that policy disagreements between citizens and the Court impact legitimacy.

In an article written by Alex Badas, he states that policy disagreement has an impact on the legitimacy of the Court.[116] In his paper, he argues against the traditional legitimacy theory that states that policy incongruence has little impact on legitimacy. His theory states that FDR's court-packing plan shows a clear relationship between policy incongruence and a decreased legitimacy of the Court.[117] He believes that during the time the FDR attempted to stack the

[114] Stephen Breyer, *Making our Democracy Work* (New York: Vintage Books, 2010), 73
[115] Ibid.
[116] Alex Badas, "Policy Disagreement and Judicial Legitimacy: Evidence from the 1937 Court-Packing Plan" *Journal of Legal Studies* 48, no. 4 (2019) 377-408. http://web.b.ebscohost.com.proxy1.library.jhu.edu/ehost/detail/detail?vid=0&sid=9842328d-2927-4546-8b68-11e1201b672b%40pdc-v-sessmgr01&bdata=JkF1dGhUeXBlPWlwLHNoaWImc2l0ZT1laG9zdC1saXZlJnNjb3BlPXNpdGU%3d#db=lft&AN=140846277
[117] Ibid.

Court, his New Deal proposals had a lot of support from the general population.[118] In his research, he found that despite the Court-packing plan failing, those who supported the New Deal supported the plan. This plan would have weakened the Supreme Court and decreased its perceived legitimacy. This would have happened because it would have been a clear demonstration to the people that if the president does not like the rulings of the Court, he can simply change the makeup of the Court itself. His study demonstrates that there could be a correlation between policy disagreement and a decrease of legitimacy. The problem with his study is that it is based on policy disagreement and the actions of a president to attempt to delegitimize the Court. If the purpose of this study is to look at the legitimacy of the Court today, similar measures would need to be applied. The next study also looks at a policy disagreement but looks at it from the perspective of contemporary issues regarding different social groups.

In a study written by Michael Zillis, he argues that citizens assess the judicial institution based on how they support the various social groups. His paper argues that citizens may view the Court's rulings in a negative light if they lean too far toward one of the minority groups who are at certain periods viewed in a negative light.[119] Specifically, he discusses how people may not be as readily willing to accept the rulings of the Court if they rule in favor of illegal immigrants or LGBTQ rights.[120] His argument asserts that people who have a policy disagreement with these rulings will not recognize the legitimacy of the rulings.[121] One example of this is when a county clerk for Rowan County refused to issue a marriage license to the same-sex couple after the Court had provided constitutional protections for same-sex couples to marry. Though this was

[118] Ibid.
[119] Michael Zilis, "Minority Groups and Judicial Legitimacy: Group Affect and the Incentives for Judicial Responsiveness" *Political Research Quarterly* 71, no. 2 (2018) 270-283, https://www-jstor-org.proxy1.library.jhu.edu/stable/26600472?seq=5#metadata_info_tab_contents
[120] Ibid.
[121] Ibid.

the action of an individual, his theory asserts that because of groupthink, those who may have policy disagreements against certain groups may work together and undermine the legitimacy of the Court.[122]

The first school of thought looked at the impact that policy disagreement can have on legitimacy. The first article analyzed FDR's New Deal and his Court-packing plan, and the second article looked at the impact the Court's rulings on minority groups had on legitimacy. Both articles do a good job proving their hypothesis; however, neither has demonstrated overwhelming proof that it could impact the legitimacy of the Court. The next school of thought about the legitimacy of the Court is known as the Positivity Theory. The first article that discusses Positivity Theory is written by James L. Gibson and Gregory A. Caldeira. This article explores the institutional loyalty that the Court may have based on what is known as Positivity Bias. This bias is the idea that judicial symbols such as robes and the Court itself demonstrate that the members of the Court are not a mere political institution but rather one that is one of law and order. In this article, the authors demonstrate that despite many not agreeing with the confirmation of Justice Alito, they looked passed the idea of ideology, policy, and partisanship and still viewed the Court and Justice Alito in high regard. This perception was a result of what the authors call institutional loyalty and positivity bias.[123]

Another article supporting the Positivity Theory idea is written by James L. Gibson, Milton Lodge, and Benjamin Woodson. This article argues that the symbols such as the robe, the

[122] Ibid.

[123] James L. Gibson, and Gregory A. Caldeira. "Confirmation Politics and The Legitimacy of the U.S. Supreme Court: Institutional Loyalty, Positivity Bias, and the Alito Nomination." *American Journal of Political Science* 53, no. 1 (January 2009): 139–55. doi:10.1111/j.1540-5907.2008.00362.x.

gavel, and the extravagant court building all play into the perception of the Court.[124] They argue this by stating that these symbols subconsciously strengthen the link between institutional support and the willingness to accept unpopular rulings. It severs the link between disappointment with rulings and willingness to challenge the ruling.[125] Essentially, in both articles, the authors argue that the appearance of the Justices impacts the way that the general population views them. Because the Court is seen to be above politics, they maintain legitimacy as the guardians of liberty.

The final school of thought is that the polarization of the Supreme Court can undercut its legitimacy. The article "Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?" combines the different schools of thought of policy disagreement and Positivity Theory into an overarching concept of polarization of the Court. In this article, James L. Gibson and Michael Nelson argue that politicization can have a significant impact on the legitimacy of the Court. It will impact the general population, realist, and legalist. If the Court appears politicized, they are viewed negatively by a large portion of the population, depending on the political balance.

This theory seems to provide the most insight into the current dynamic that is occurring with the Court. Specifically, it best addresses the critiques that have been placed on the Court by the liberal media and liberal politicians alike. It also addresses the concerns that many presidents have debated about during their campaigns. It has become an essential issue in elections as many presidents campaign on the idea of placing a judge that falls within a specific ideological line on

[124] James L. Gibson, Milton Lodge, and Benjamin Woodson. 2014. "Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority." *Law & Society Review* 48 (4): 837–66. doi:10.1111/lasr.12104.
[125] James L. Gibson, and Michael J. Nelson. 2017. "Reconsidering Positivity Theory: What Roles Do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy?" *Journal of Empirical Legal Studies* 14 (3): 592–617. doi:10.1111/jels.12157.

the bench. For this reason, this is the theory used moving forward with the study about Court legitimacy.

To determine if the Court has become polarized, data was gathered from the Supreme Court database for two-year groups. These year groups include the cases from 1970-1993 and the cases from 1994-2017. The primary focus of this research was to look at cases from 1994-2017; this decision was based on a study conducted by Pew Research, which found that in 1994, Senators and Congressman began noticeably moving ideologically further right or left on the political spectrum.[126] The 1970-1993 year group acts as the control group to compare to the 1994-2017 year group. The information gathered for these year groups focused on the number of cases heard with filtered results to remove cases that could not be categorized politically. It also included the justices that heard the cases and their associated Martin-Quinn score. The Martin-Quinn scores measure the justices on an ideological continuum.[127] Other information gathered includes each justices voting percentages per year, the percentage of liberal and conservative majority opinions; the percentage of unanimous decisions per year; and the percentage of 1-vote margin decisions per year. Not only has this information been used to help address the question about polarization in the judiciary, but research was also conducted on the nomination and confirmation of Supreme Court Justices.

Supreme Court Nominations

[126] Drew Desilver, "The polarized Congress of today has its roots in the 1970s" *Pew Research,* June 12, 2014, https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/

[127] "Martin-Quinn scores" https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/

Many presidents going back to the early 19th century have used political ideology as a factor for nominating federal judges.[128] However, since 1994, it seems that ideology has become the primary measure of nominations to the Supreme Court.[129] This has created an impact on the confirmation process. Before 1994, most of the justices were confirmed by supermajorities. There are a few outliers, one being Justice Clarence Thomas, who was appointed in 1991. This outlier is partially a result of an accusation that came to light during his confirmation hearing. However, going back to the supermajorities, some examples include, Antonin Scalia who received a Senate vote margin of 98-0 and Justice O'Connor, who received a vote margin of 99-0.[130] Another example is Ruth Bader Ginsburg, who was nominated in 1993 and received a vote margin of 96-3.[131] Ruth Bader Ginsburg was the last justice to receive a vote exceeding 90. In 1994 Justice Breyer received a vote of 87-9.[132] Since then, no justice nominees have received a vote margin that high. For instance, Chief Justice Roberts was confirmed with a vote of 78-22.[133] Justice Alito was confirmed with a vote margin of 58-42.[134] In the Obama Presidency, votes climbed slightly with Justice Sotomayor getting a 68-31 vote and Justice Kagan receiving a 63-37 vote.[135] However, President Trump's nominees saw a drop with Justice Gorsuch receiving a 54-45 vote total, and Justice Kavanaugh only getting a 50-48 confirmation vote.[136] It is also worth noting that in 2016 Republican Senators refused to bring President Obama's nominee to a vote following the passing of Justice Scalia. This action set up the opportunity for President

[128] Richard L. Hansen, "Polarization and the Judiciary"
[129] Ibid.
[130] "Supreme Court Nominations: present-1789"
https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm
[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid.

Trump to nominate his first justice to the Court. During this confirmation process, Democrats who were frustrated with Republican refusal to bring President Obama's nomination to a vote promised a showdown for confirmation.[137] This proved to be the case as the Senate had to change the rules to have Neil Gorsuch confirmed. Another embittered battle ensued when Justice Kennedy retired, and President Trump again had the chance to nominate a justice. The second nomination concerned Democrats more than the first, as this nomination would likely tip the Court for a long time. The reason the Court would tip was that Justice Kennedy though more conservative would often serve as a swing vote on liberal-leaning cases. This battle was long as allegations surfaced of wrongdoing by the future Justice Brett Kavanaugh. Which ultimately stalled the confirmation process. Conservatives believed that the accusations were an attempt by the liberal faction to stop the nomination process. These factors demonstrate a polarized nomination and confirmation process. Looking at this data, political polarization has had a significant impact on the Supreme Court's nomination and confirmation process. This polarized process begs the question, does the polarization of the nomination process create polarization on the bench?

Unanimous decision v. 1-vote Split

Setting up the Study

As the information has shown so far, polarization has had an impact on the nomination and confirmation process of Supreme Court justices. This indicates that polarization has some degree of impact on the Court. What needs to be addressed is if polarization has had any impact on the decisions of the Court. To determine this, the Supreme Court database was used to get

[137] Julie Hirschfeld Davis & Mark Landler "Trump Nominates Neil Gorsuch to the Supreme Court" *The New York Times,* January 31, 2017, https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html

information about the cases classified into liberal or conservative rulings. The cases of interest were cases from 1970-2017, split into two distinct year groups, one group being 1970-1993, and the second group is 1994-2017. Within each year group, every year was looked at, to find the number of unanimous decisions for the Court. This included 5-0 up to 9-0 decisions as the justices do not always participate in every decision. Next, the amount of 1-vote margin cases was looked up, which included 5-4 and 4-3 decisions. They then got divided by the total number of cases heard that year. Which provided a percentage of unanimous and 1-vote margin cases.

The Data

In the year group of 1970-1993, the Supreme Court rendered judgment on 3,631 cases, which fell into one of the two political ideologies. Of these cases, the Court ruled unanimously on 39.5% of them. They also had 17.03% of their cases come down to a one-vote margin. In the 1994-2017 year group, the Court heard 1,943 cases, and 45.73% of cases were decided unanimously, while 19.64% of the cases came down to a 1-vote margin. As it can be observed, the average of unanimous cases rose by 6.23%, and the amount of 1-vote margin cases rose by 2.61%.

The Analysis

Taking this data at face value, both categories rose on average. Some scholars look at this data and see this as a growing partisan divide within the Court. These scholars argue that the rise in 1-vote margin cases shows a correlation of political polarization. They argue this by addressing the 1-vote margin category, stating that it is a result of the Court deciding on high-salience political issues, which results in a polarized divide.[138] However, despite this argument,

[138] Richard L. Hansen, "Polarization and the Judiciary"

the rise in unanimous cases was still 3.62% higher than those with 1-vote margins, which would indicate that the Court may be coming closer together.

Conservative v. Liberal Decisions

Setting up the Study

Much like the first study, the cases of interest were cases from 1970-2017, split into two distinct year groups, one group being 1970-1993, and the second group is 1994-2017. Furthermore, for each year in the group, the justices who sat on the bench were identified. Once the justices were identified, the Martin-Quinn score was then assigned. For this study, the single year group Martin-Quinn (MQ) scores were not used, but instead, the scores were averaged out over the lifetime of the judge. The reason for this was to determine which direction they lean overall. If the scores were taken on each year, it could skew the data as the score is affected by the way that the justice voted each year. This would have the possibility of turning "liberal" justices conservative and vice-versa. Once each justice was assigned their average MQ score, the focus turned to the percentage of times that the justice voted conservatively or liberally. The average of these was taken to get a total lifetime voting percentage. As some justices served before 1970 or in both year groups, their voting averages were also averaged from the start of a year group (or when they started their tenure) to the end of the year group. This information was then compared to the averages of the Supreme Court decision percentages. Finally, the averages of decisions for the year groups were taken and compared.

The Data

The following table illustrates the data found about the justices and their voting behavior.

Justices	Life Time Conservative %	Life Time Liberal %	1970-1993 C%	1970-1993 L%	1994-2017 C%	1994-2017 L%	Diff Vote/Decision 1970-1993	Diff Vote/Decision 1994-201
Douglas /-4.15/51.33C	41.88%	58.12%	54.47%	45.53%			2.73	
Black/-1.76/51.8C	38.74%	61.26%	51.82%	48.18%			0.02	
Harlan/1.64/51.8C	34.27%	65.73%	48.98%	51.02%			-2.82	
Stewart/.563/54.26C	44.18%	55.82%	54.82%	45.18%			0.56	
White/.44/54.72C	48.64%	51.36%	54.65%	45.35%			-0.06	
Marshall/-2.83/54.85C	53.06%	46.94%	55.35%	44.62%			0.5	
Burger/1.83/55.24C	55.90%	44.10%	56.36%	43.36%			1.12	
Blackmun/-.116/54.79C	55.31%	44.69%	55.14%	44.86%			0.35	
Brennan /-1.94/55.11C	46.49%	53.51%	55.90%	44.10%			0.79	
Powell/.993/55.37C	57.86%	42.14%	56.75%	43.25%			1.02	
Rehnquist/2.86*/54.92C/56.69C	56.66%	43.34%	55.66%	44.34%	56.95%	43.05%	0.74	0.26
Stevens/-1.5*/55.7C/56.37C	56.16%	43.84%	55.28%	44.72%	55.80%	44.20%	-0.42	-0.57
O'Connor/.896*/55.24C/56.91C	56.05%	43.95%	55.16%	44.84%	56.52%	43.48%	-0.08	-0.39
Scalia/2.476*/53.89C/54.70C	54.73%	45.27%	53.94%	46.06%	54.73%	45.27%	0.04	0.03
Kennedy/.67*/53.9C/54.31C	54.23%	45.77%	52.03%	47.97%	54.30%	45.70%	-1.87	-0.01
Souter/-.803*/53.19C/56.79C	54.79%	45.21%	53.88%	46.12%	54.50%	44.50%	0.69	-2.29
Thomas/3.476*/54.39C/54.31C	53.64%	46.36%	53.45%	46.55%	53.10%	46.90%	-0.94	-1.21
Ginsburg/-1.728*/56.38/54.31C	54.30%	45.70%	56.38%	43.62%	53.73%	46.27%	0	-0.58
Breyer/-1.204/54.31C	54.22%	45.78%			51.58%	48.42%		-2.73
Roberts/1.174/52.29C	53.02%	46.98%			53.02%	46.98%		0.73
Alito/1.744/51.70C	53.16%	46.84%			52.63%	47.37%		0.93
Sotomayor/-2.535/50.16C	50.25%	49.75%			49.89%	50.11%		-0.28
Kagan/-1.631/50.18C	49.81%	50.19%			50.78%	49.22%		0.59
Gorsuch/1.232/50.04C	52.94%	47.06%			59.79%	40.21%		9.39

Figure 1

To provide a better understanding of the graph, the following details will be provided: In the Justice column, there are the MQ scores of each justice. If the score is positive, it means the justice is likely to vote more conservatively; if the score is negative, the justice is likely to vote more liberally. Also, in the justice column, the average vote of the Court for each justice during their tenure is provided. In the next section, the lifetime voting percentages of each justice is seen. In the third section, the percentage of times that each justice voted conservative within their time in the year group is presented. The final section will be the topic of discussion, which is the difference between each justice's voting percentage and the average of the Court. In this graph, the differences are calculated using the average of conservative voting. If the number is negative, it indicates that they voted more liberally. As this graph indicates, despite the political leaning score of justices, many of the justices voted closely with the overall average of the decisions. If they were not closely aligned with the decisions, there does not seem to be an immediate correlation between political score and voting difference. This can be seen with Justice Douglas, who had a high lifetime voting record of liberal voting but was found during his tenure in his

year group to have voted 2.73% higher than the Court conservative voting. This is also evident with Justice Ginsberg, who is well known as one of the more liberal justices, but she voted in line with the Court in the 1970-1993 year group and .58% more conservative than the average of Court rulings in the 1994-2017 year group. Though both year groups remain close to the center, one thing is that the 1994-2017 group had a slightly higher difference than the 1970-1993 year group. Which does indicate a potential drift toward polarization. However, it is worth noting that despite political ideology score, many of these justice's votes were closely aligned with one another. In fact, some of the liberal justices are found to have a higher conservative record than some conservative justices and vice-versa. The final dataset is the average voting percentage of the 1970-1993 year group and the 1994-2017 year group. This data is compared with the ideological makeup of the Court. Except for 1970, the Court was made up of 33% conservative, 33% liberal, and 33% moderate in the 1970-1993 year group. Note that the moderate determination was made for this study based on an MQ score below .6 in either direction. In the 1970-1993 year group, the Court ruled conservatively, on average 54.79% of the time, while ruling liberally 45.21% of the time. In the 1994-2017 year group, the Court was made up of 56% conservative justices and 44% liberal justices. During this time frame, the justices ruled

conservatively 54.31% of the time and liberally 45.69% of the time. This information is in the table below:

Year	Voting	Voting	Year	Voting2	Voting3
1970	51.80%	48.20%	1994	59.55%	40.45%
1971	45.09%	54.91%	1995	54.55%	45.45%
1972	53.93%	46.07%	1996	63.54%	36.46%
1973	56.14%	43.86%	1997	59.79%	40.21%
1974	49.67%	50.33%	1998	64.04%	35.96%
1975	62.22%	37.78%	1999	50.00%	50.00%
1976	59.77%	40.23%	2000	49.41%	50.59%
1977	50%	50%	2001	60.24%	39.76%
1978	60.51%	39.49%	2002	59.26%	40.74%
1979	48.68%	51.32%	2003	57.69%	42.31%
1980	59.03%	40.97%	2004	45.57%	54.43%
1981	53.22%	46.78%	2005	59.30%	40.70%
1982	56.79%	43.21%	2006	58.67%	41.33%
1983	61.90%	38.10%	2007	48.57%	51.43%
1984	55.84%	44.16%	2008	61.73%	38.27%
1985	59.26%	40.74%	2009	50.00%	50.00%
1986	53.80%	46.20%	2010	56.25%	43.75%
1987	51.37%	48.63%	2011	56.58%	43.42%
1988	59.18%	40.82%	2012	50.63%	49.37%
1989	54.01%	45.99%	2013	44.59%	55.41%
1990	49.59%	50.41%	2014	42.03%	57.97%
1991	53.33%	46.67%	2015	51.32%	48.68%
1992	53.45%	46.55%	2016	47.83%	52.17%
1993	56.38%	43.62%	2017	52.24%	47.76%

Figure 2

The Analysis

The data presented above look at the justices' ideology score and look at the justices' voting record. The idea is that if the political polarization impacts the Court, the expectation is that as polarization increased, the ideology scores would have more bearing on how the justices were likely to vote. As noted above, when the voting records of the justices were averaged out and then subtracted from the average of the Court rulings, they were assigned a difference percentage. The expectation is that as polarization continued to increase, the differences would also increase specifically within the ideological spectrum that each justice is supposed to fall in. Which did not happen, as some liberal justices had a higher conservative voting record than the

average Court ruling. The reverse of this occurred for some of the conservative justices on the bench. This indicates that despite the perception of polarization, it cannot immediately be attributed to the justices' understood leanings. The final piece of data that should indicate a polarization on the bench is comparing the two-year group's overall voting percentage. If the Court were polarized, conservative rulings would increase overall as the Court had a consistent 5-4 split along the conservative lines during the 1994-2017 year group. However, after getting the average, the opposite occurred, as the average conservative ruling dropped by .48%. This would indicate that the rulings are starting to come closer to the center.

The polarization of the Court can have severe implications on how citizens view the Court. As it has already been stated, if the United States citizens view the Court as another political organization, the Court will begin to lose legitimacy. As the data above indicates, currently, it does not appear that the Court is becoming increasingly polarized. However, looking at the data provided above, some justices appear to be more polarized than their predecessors. Three worth noting are Justice Sotomayor, Justice Kagan, and Justice Gorsuch. More details will have to emerge for Justice Gorsuch as the data only looks at his first two terms. However, Justice Sotomayor had nine years on the bench for the data. She voted almost consistently along her ideological lines and had a lower rate of agreeance with the Court than the other justices. Despite this, the Court still has not drifted toward polarization. More studies will need to be done to determine if the Court will continue to see a shift along ideological lines. One thing that may prevent this from happening is the Chief Justice of the Supreme Court. Chief Justice Roberts has said that it is not the Courts responsibility to make law but rather interpret it. This next section will explore his role as Chief Justice to preserve the Court's legitimacy.

Chief Justice and Legitimacy

As accusations against the current Court continue to circulate, Chief Justice Roberts has taken many steps to demonstrate to the public his desire to maintain an independent judiciary free from partisan politics. In his end of the year report in 2019, he stated, "I ask my judicial colleagues to continue their efforts to promote public confidence in the judiciary, both through their rulings and through civic outreach."[139] He then states, "We should reflect on our duty to judge without fear or favor, deciding each mater with humility, integrity, and dispatch."[140] This is not the first time the Chief Justice Roberts has commented on the need for an independent judiciary who must maintain public trust. He understands that the Court must maintain public support if they are to maintain the legitimacy that is required for citizens to follow unpopular decisions. Therefore, he has tried, especially in the most recent session, to appear as non-partisan as possible. This section will look at his recent cases he has been the deciding vote on and will also include some of his comments regarding those cases.

June Medical Services v. Russo

On June 29, 2020, the case of *June Medical Services v. Russo* was decided by a narrow 5-4 split decision. This case was in response to a Louisiana law requiring abortion doctors to have admitting privileges at a hospital.[141] In this case, Chief Justice Roberts sided with the four liberal justices and struck down the law. This law was like a Texas law that was struck down in 2016 by the Supreme Court by a 5-4 split. However, in 2016 Chief Justice Roberts sided with the minority justices and found the law to be within the constitutional limits. For the *June Medical Services v. Russo* case, Justice Breyer authored the majority opinion and cited the same reasons

[139] John Roberts, "2019 Year-End Report on the Federal Judiciary" December 31, 2019, https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf
[140] Ibid.
[141] *June Medical Services, LLC v. Russo, 591 U.S.*

as he had in 2016. Although Chief Justice Roberts sided with the four liberal justices, he did not concur with their opinion and instead wrote his own. In his opinion, he stated that he felt that a similar case in 2016 had been wrongly decided. However, it was the responsibility of the Court to uphold the legal doctrine of stare decisis, which requires them, absent exceptional circumstances, to treat the cases alike. In this first case, Chief Justice Roberts demonstrates judicial restraint and tries to uphold the Court's tradition. This appears to demonstrate a clear and defined attempt to act in good faith toward the public and prove that the Court is not just another political entity. If he were acting along partisan lines, it would likely have resulted in the Court overturning previously decided precedent.

Department of Homeland Security v. Regents of the University of California

On June 18, 2020, the case of *the Department of Homeland Security v. Regents of the University of California* was decided on a 5-4 split court margin. Again, like the abortion case, Chief Justice Roberts sided with the four liberal justices. However, this time he did not write a separate opinion but instead wrote the primary opinion. This case was in response to President Trump's administration, removing the protections outlined in the Deferred Action for Childhood Arrivals. In Chief Justice Robert's opinion, he stated that the matter was not if the DHS had the authority to rescind the act, because they did, but it was a matter of how they did it.[142] From the vantage point of the average citizen, this would appear to be a victory for the left-leaning population. However, as his opinion demonstrates, it is merely delaying the action from occurring and would require the DHS to attempt to rescind DACA again. This was a very strategic move on behalf of Chief Justice Roberts because it does not necessarily rule against the

[142] *Department of Homeland Security v. Regents of University of California, 591 U.S.*

president, but it does not favor him either. This helps shore up the idea that the Court is not acting politically. As the introduction to this chapter showed, many have questioned the legitimacy of the Court, especially the liberal population, because it has a conservative majority. Through the current actions of Chief Justice Roberts, he is trying to demonstrate that the Court can still operate in a non-partisan manner. What needs to be addressed is if the public will view this as an intentional strategy or see it as a genuine attempt to preserve non-partisan judicial behavior.

These two cases are only a few of the cases that Chief Justice Roberts has sided with the liberal justices. With many liberals calling his Court into question, his steps have been calculated to maintain the legitimacy of the Court. These two cases were important cases to the political left. Because they were important, and the left has continuously threatened the legitimacy of the Court, Chief Justice Roberts has been meticulous about how he has worked his opinions showing that he is willing to uphold previous Court decisions while also trying to preserve his standing with the right by stating his disagreement with the decisions. In September of 2019, Chief Justice Roberts discussed the concept of upholding the previous precedent. He stated,

> I also think of humility in terms of humility to the past. There is no reason to suppose that I and my eight colleagues are any better at decerning the meaning of the Constitution than members of the Court that went before us. Therefore, we begin with respect and humility towards precedent that has been established by those prior judges and depart

from that precedent only in the most significant cases, and for the most significant reasons.[143]

This quote came from an article written before the decisions rendered in June of 2020. This demonstrates that he holds previous precedent in high regard and will not overrule it unless necessary. This action will only show the public that Chief Justice Roberts intends to reside over a non-partisan Court.

Congressional/Presidential Relationship

Much of this chapter has focused on public opinion and how it impacts legitimacy. However, this is only one part of how the Court maintains legitimacy. As Federalist No. 78 points out, the Court does not have the power of the purse or the sword. Therefore, they cannot enforce their decisions. This means that to maintain legitimacy, they must have presidential and Congressional support. In the last section, two cases were discussed in which Chief Justice Roberts sided with the four liberal justices. This decision may have positive impacts on how the liberal public views the Court, but it could have damaging effects on how Congress and the president view the Court. This is not the only time that the Court has faced objections from the sitting president or Congress. This section will discuss several examples of presidential attempts to undermine the Court as well as negative comments from legislators.

With the recent decisions, Chief Justice Roberts and his colleagues on the left have faced much criticism from the conservative members of Congress. One such example came after the ruling on DACA. Senator Ted Cruz of Texas stated, "Over recent years, more and more, Chief

[143] "Chief Justice Roberts Defends Supreme Court Against Partisan Criticism" *The Wall Street Journal,* September 25, 2019, https://www.wsj.com/articles/chief-justice-roberts-defends-supreme-court-against-partisan-criticism-11569423820

Justice Roberts has been playing games with the court to achieve the policy outcomes he desires."[144] President Donald Trump joined in tweeting, "The recent Supreme Court decisions, not only on DACA, Sanctuary Cities, Census, and others, tell you only one thing, we need new justices"[145] These types of statements from lawmakers and the president can do severe damage to the legitimacy of the Court. The main reason is that Congress and the president are the ones who will implement and enforce the Courts decisions. Despite the rebukes from the president and other conservative policymakers, Chief Justice Roberts's actions may have warded off any new attempts to stack the Court. This is far more important because packing a Court would demolish the legitimacy of the Court as it would weaken its current power. Court-packing is a real possibility; ever since Justice Kavanaugh was confirmed to the bench, liberal politicians have made several calls to attempt to pack the Court.[146]

The rebukes from the conservative faction are not the only examples of the Court facing challenges from the president and Congress. In March of 2020, Chief Justice Roberts had to rebuke Senator Schumer when he stated that Justice Kavanaugh and Justice Gorsuch "won't know what hit them if they vote to uphold abortion restrictions."[147] He went on further to say, "I want to tell you, Gorsuch, I want to tell you, Kavanaugh, you have released the whirlwind, and you will pay the price."[148] This comment demonstrates that policymakers have little concern

[144] Ronn Blitzer, "Roberts drifts away from conservative bloc, angering Republicans and exciting the left" *Fox News,* July 1, 2020, https://www.foxnews.com/politics/roberts-drifts-away-from-conservative-bloc-angering-republicans-and-exciting-the-left
[145] Ibid.
[146] Henry Olsen, "Is John Roberts trying to save the Supreme Court from Democratic Packing" *The Washington Post,* June 30, 2020, https://www.washingtonpost.com/opinions/2020/06/30/is-john-roberts-trying-save-supreme-court-democratic-packing/
[147] Pete Williams, "In rare rebuke, Chief Roberts slams Schumer for 'threating' comments" *NBC News,* March 4, 2020, https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-schumer-threatening-comments-n1150036
[148] Ibid.

about chastising the Court, but these actions can undermine the judicial institution. Like the comments, the idea of Court-packing has also occurred in the past. In 1937 President Roosevelt attempted to pack the Court to push forward with his New Deal measures.[149] However, some justices saw this and switched their stance on specific items and regained confidence from the public. This action prevented the Court from losing legitimacy.[150] As the above examples demonstrate, regardless of how the Court acts, if the decisions are not in line with the ideological beliefs of the politicians in power, the Court may be challenged. This means that the Court is always having to act to maintain legitimacy. This is dangerous because it could possibly jeopardize true constitutional principles.

Conclusion

The power of the Court relies heavily on public opinion to maintain legitimacy. If the public is unwilling to follow the decisions of the Court, their decisions will become meaningless. Therefore, the Court must maintain a persona as a non-partisan entity. As the data suggested, the Court has not fallen victim to actual partisan behaviors at this time, but there are a few justices that seem to be trending toward that area. Currently, it seems that it is up to Chief Justice Roberts to act as the swing vote to ensure that the Court maintains the view of legitimacy. This could also hold off calls for Court-packing. The downside to this approach is that it does risk the chance of losing presidential support. This could result in the president's decision to ignore the Court and go the way of Andrew Jackson, who is credited with saying, "Chief Justice Marshall has made his decision, now let him enforce it." At this time, it does not appear that the president is going to ignore the rulings, but that remains to be seen. Although this study provides a comprehensive

[149] Henry Olsen, "Is John Roberts trying to save the Supreme Court from Democratic Packing"
[150] Ibid.

review of the Court and looks at polarization, additional studies need to be done. Specifically, updates with additional rulings with the two new conservative justices need to be included. Additionally, some of the more volatile cases may need to be reviewed to add context to the polarization discussion. Despite these shortcomings, this study does provide enough detail to demonstrate that the Court does still maintain legitimacy.

Conclusion

"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[151] These are the words written by Alexander Hamilton in Federalist No. 78 when the founders were trying to convince the states to adopt the United States' new Constitution. This paper has explored this idea of the "least dangerous branch" and has considered many different aspects of the argument. It was determined that for the judicial branch to be "powerful," it must meet specific criteria. The first factor was that its power for judicial review had to be valid. That is, it needed to be a constitutional power that was granted and not merely a power provided to itself. The second factor that needed to be attained was that it had to possess judicial supremacy. What this means is that the Court had to be the final say on the matter. The third factor was that it had to maintain legitimacy so that its rulings would be followed. Throughout this paper, the objective was to demonstrate that despite the perception of an increasingly powerful Court, it is still, in fact, the least dangerous branch. Despite having specific criteria that have been met, the main idea is that it still does not have the power of the purse or the power of the sword. Because they do not possess that power, they ultimately cannot enforce their rulings.

The process to get to this conclusion was through a series of chapters aimed at analyzing the three factors to determine if the Court met requirements. The first requirement was the power of judicial review. In this chapter, the conclusion was that the Court did possess the power of

[151] Alexander Hamilton, "Federalist No. 78"

judicial review. This was based on the studies done on the Constitutional text and the Federalist and Anti-Federalist papers. Using the Constitution's text to discuss the power of the judiciary to have jurisdiction of all laws subject to the Constitution, and then using the supremacy clause as the Constitution being the supreme law of the land, it would imply that the founders intended the Court to have the power.

Furthermore, when Federalist No. 78 was reviewed, it explicitly said that the judiciary would have the power to void laws contrary to the Constitution. Finally, cases from the pre-constitutional era were analyzed, and they demonstrated an apparent use of judicial review. If one were to look at standard practices at the time of the founding, it is reasonable to assume that most people would have accepted that it was the judiciary's role to interpret and strike down laws. Especially since this was common practice amongst several states at the time that the Constitution was ratified. Given the conclusion drawn on the chapter, this achieved the first factor the Court needed even to have the consideration that they have grown in power.

The next factor that was explored in this paper is if the Court possessed judicial supremacy. In this chapter, the Constitution was again analyzed to see if there was anything in there that could indicate that the Court was to be the final say. When the Constitution was analyzed, there were some indicators that the Court may have judicial supremacy. Specifically, Article III states that judicial power should be vested in one Supreme Court. This section indicates that the power is vested in the Court. Then in Article VI, it states that the Constitution is the supreme law of the land. This would allude to the Court possessing the ultimate authority. However, as the chapter indicated, the Constitution states that Congress and the president also have a role in the execution of the Constitution. This leaves the idea of supremacy up in the air. The same was true when Federalist No. 78 was analyzed because, in Federalist No. 78, it implies

that the judiciary still relied on the other branches to implement their decisions. This alone would indicate that supremacy may not exist. A similar thing was found in Federalist No. 81, where Hamilton again acknowledges that the Court may have the final say. However, he then goes back and states that it may only apply to that case, and Congress could pass a new law or amendment to override the Court. These all provided examples of how the Court could possess supremacy, but it was contingent on the other branches' willingness to follow the Court. What this means is that this alone proves that the Court is still the least dangerous branch. However, to determine how much power the Court possessed, it was still essential to determine how the Court maintains legitimacy and if it was still a legitimate institution.

The third factor the Court had to possess to be considered powerful was legitimacy. The idea is that if the public views the Court as an illegitimate institution, the public will be less likely to follow their decisions, especially those deemed unpopular. In this chapter, the argument was that for the Court to maintain legitimacy, the public still needed to view it as a non-partisan body. The Supreme Court's actions were analyzed from 1970-2017 to prove that the court was operating in a non-partisan manner. The Court's actions were broken up into two separate year groups, one acting as the control and the other being the test group. The two groups were based on research that showed a rapid increase in the United States polarization starting around 1994. Therefore, the groups were broken up into the 1970-1993 group and the 1994-2017 group. When the data was carefully analyzed, it was determined that there was no clear indication of polarization. However, it also showed that there could be increased polarization as time went on. Another factor that was assessed was the role of Chief Justice Roberts operating as a swing vote. The purpose behind this action was so that the Chief Justice could maintain the appearance of a non-partisan Court. The final factor that was explored was the relationship between the president

and Congress with the Court. This section demonstrated just how sensitive the legitimacy of the Court could be. Congress and the president can undermine the Court with a few simple words or fail to implement the Court's policy, which could also undermine their legitimacy.

With all these factors considered, no other conclusion can be drawn except that the Court is still the least dangerous branch. As it has been proven, the Court still cannot enforce their rulings. Currently, the Court still must prove itself as a non-partisan organization just to maintain any degree of legitimacy. At the same time, Congress and the president can act in almost any fashion and still have legitimacy in their actions. Furthermore, it only takes one time for the president to ignore the Court to unravel their legitimacy. If the Court were truly more powerful than intended, they would not worry about trying to be non-partisan. If that were the case, there should be more rulings in favor of conservative policies and more split decisions. However, that has not occurred, and it shows that the Court is still the least dangerous branch.

This paper explored many different factors of the Court to come to this conclusion. However, additional studies may need to be accomplished in the future, especially in the realm of polarization. During this study, it appeared that a few justices were beginning to rule more in line with their political ideology. To see if this trend continues, future scholars would need to look at the modern justices and determine if they continued the trend of political ideology impacting their rulings. Furthermore, studies would need to be conducted into specific cases along the ideological lines. These additional studies could provide more context into the polarization topic. Specific areas that should be studied are the ramifications of Chief Justice Roberts actions acting as a swing justice. Specifically, it may be important to see if his actions have resulted in the conservative faction viewing the Court in a lesser light. Another important area that may need further study is to see what happens if a conservative ends up nominating the

replacement for Justice Ginsberg. At this point, many liberal politicians say that they would work to increase the justices if Justice Ginsberg is replaced by a conservative. Another thing that may need to be done is a deeper dive into the use of judicial review, as this paper only scratched the surface. Though this paper determined that judicial review is constitutional, it may be beneficial to see if the judicial review that exists today was the review intended by the founders. Another area that may need some focus is how the lower courts impact the view of the judiciary. Even though they are not Supreme, they impact change more than the high Court because they hear far more cases. The actions of the lower courts could impact the way people view the judiciary. Finally, it may be beneficial to explore more on judicial supremacy by analyzing several cases throughout history. If future scholars could look at every ruling that the Court has made and look at the micro-level (how cities and states follow the rulings), it may provide better insight into the power of the Court and how their rulings are being followed.

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